Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

LAWRENCE KELLER,

Petitioner,

vs.

THE STATE OF WASHINGTON,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Washington

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the holding of *Apprendi v. New Jersey* exclude from the due process and jury trial guarantees solely the "fact" of a prior conviction, or also the disputed qualities of that prior conviction that increase the sentence from a statutory maximum of five years to a mandatory sentence of life in prison without parole?

2. Does a logical application of the reasoning of *Apprendi* to a case in which the quality of a prior conviction is contested call for this Court to re-examine and overrule its holding in *Almendarez-Torres*?

3. Does the imposition of a sentence of life in prison without the possibility of parole for a lowest level felony that does not require a criminal mens rea violate the Eighth Amendment's prohibition against cruel and unusual punishment?

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PETITION FOR CERTIORARI

Lawrence Keller respectfully prays that this Court issue a Writ of Certiorari to review the judgment and opinion of the Washington Supreme Court entered in this proceeding on March 22, 2001, and the opinion of the Washington Court of Appeals to the extent it addressed these issues, in order to resolve the conflict between those opinions and the decisions of this Court and the United States Court of Appeals for the Ninth Circuit on important federal issues.

OPINIONS BELOW

The opinions of the Washington appellate courts that give rise to this petition are partially reported. *State v. Keller*, 143 Wash. 2d 267, 19 P.3d 1030 (2001), affirming *State v. Keller*, 98 Wash. App. 381, 990 P.2d 423 (1999).[1]

JURISDICTION

The Washington Supreme Court issued its Order Denying Motion for Reconsideration on August 16, 2001.[2] Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of that ruling.

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[1] The Washington Supreme Court opinion is attached as Appendix A to this petition. The Washington Court of Appeals opinion is attached as Appendix B. The Judgment and Sentence is attached as Appendix C.

[2] The Order Denying Motion for Reconsideration is attached as Appendix F.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 2101(c).

STATUTES INVOLVED IN THIS CASE

U.S. Constitution, Amendment VI:

> **Jury trial for crimes, and procedural rights**
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

U.S. Constitution, Amendment VIII:

> **Excessive bail, fines, punishments**
> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Constitution, Amendment XIV:

> **§ 1. Citizenship rights not to be abridged by states**
> . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

Arizona Revised Statute § 13-1204[3]

Former Revised Code of Washington 9.94A.030(21)[4]

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[3] The text of the Arizona statute is contained in Appendix G to this petition.

[4] The text of the Washington statutes is contained in Appendix H to this petition. The numbers of the subsections have changed due to later amendments, but the text of these subsections remains essentially the same.

Former Revised Code of Washington 9.94A.030(25)

Revised Code of Washington 9.94A.120

Revised Code of Washington 9.94A.125

Revised Code of Washington 9A.20.021

Revised Code of Washington 9A.36.021

Revised Code of Washington 9A.36.031

Former Revised Code of Washington 46.61.522

STATEMENT OF THE CASE

On October 16, 1994, petitioner Lawrence John Keller was involved in an auto accident. He was convicted by a jury of vehicular assault. RCW 46.61.522(1)(b); Judgment and Sentence.[5]

Vehicular assault at the time of this offense was a Class C felony. The maximum penalty permitted by statute was five years in prison and a $10,000 fine. RCW 9A.20.021, former RCW 46.61.522(b).[6]

The court sentenced Mr. Keller to life in prison without the possibility of parole. Judgment and Sentence. This sentence was under the Persistent Offender Accountability Act ("POAA"), enacted by a 1993 citizen initiative.

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[5] Appendix C. Mr. Keller also was convicted of felony hit & run, a charge not at issue here.

[6] The statute was amended in 1996 to be a Class B felony with a maximum offense of 10 years in prison and a $20,000 fine.

Popularly known as "Three Strikes, You're Out," the POAA requires a sentence of life without possibility of parole upon the conviction of a third "most serious offense."[7] The existence and validity of the prior offenses are not tried to the jury, but must be found by the sentencing court to have been proven by a preponderance of the evidence.[8]

The only elements charged, tried, and decided by the jury for the current offense were the statutory elements for vehicular assault. There was no proof offered to the jury regarding the existence, quality or nature of the prior convictions. The sentence was determined by the trial judge. *Keller*, 143 Wash. 2d at 271-72.

Mr. Keller had two prior felony convictions: a 1979 Washington conviction for Assault 2°, and a 1983 Arizona conviction for Aggravated Assault.[9] Mr. Keller's plea to the Arizona offense referred solely to the statutes; it did not specify the elements of the crime to which he was pleading. Arizona Plea Agreement, Judgment and Sentence (Appendix E).

At an evidentiary hearing to the court, the defense contested what elements had been included in the guilty

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[7] Former RCW 9.94A.030(21) and (25); RCW 9.94A.120(4); *Keller*, 143 Wash. 2d at 282 (Appendix A-7).

[8] *State v. Manussier*, 129 Wash. 2d 652, 679-84, 921 P.2d 473 (1996); *State v. Thorne*, 129 Wash. 2d 736, 781-84, 921 P.2d 514 (1996).

[9] "[A] class 3 dangerous felony in violation of ARS 13-1204, 13-1203, 13-701, 13-702, 13-801 and 13-604." Plea Agreement, Appendix E.

plea. The defense argued that the Arizona conviction was comparable to Washington's Assault 3°: it involved assaulting by placing another person in a reasonable state of fear, and was "aggravated" by the person being a peace officer performing his duties. Compare: ARS 13-1204(A)(5) and RCW 9A.36.031.

Under ARS 13-1204(A)(2), use of a deadly weapon during an assault also is an aggravating factor. The plea agreement and judgment and sentence did not specify either of these subsections or either of these specific elements to define the crime to which Mr. Keller pleaded guilty. Arizona Plea Agreement, Judgment & Sentence (Appendix E).

The trial judge found the Arizona conviction was the equivalent of Washington's Assault 3°, a Class C felony. RP 2825.[10] It nonetheless concluded the Arizona conviction was "comparable to a most serious offense," and so counted as a prior "strike." *Id.*; Judgment & Sentence (Appendix C).

A conviction of Assault 3° can only be a "most serious offense" "with a deadly weapon verdict under RCW 9.94A.125." Former RCW 9.94A.030(25)(t). This statutory "deadly weapon special verdict," however, requires: (1) a special allegation, (2) evidence establishing the deadly weapon, and, (3)

> the court shall make a finding of fact of whether or not the accused or an accomplice was armed

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[10] This finding was never disputed by the state and so is the law of the case. The Washington Supreme Court acknowledged it was found comparable to a Class C felony, although it mistakenly referred to Assault 2° (a Class B felony) in its opinion. *Keller*, 143 Wash. 2d at 281-82 (Appendix A-16 - A-17).

> with a deadly weapon at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

RCW 9.94A.125. Washington law requires this deadly weapon sentencing enhancement factor be proved beyond a reasonable doubt.[11]

The Washington trial court thus impliedly made, without a jury, a "special finding" of a deadly weapon in the Arizona case by a preponderance of the evidence.

On appeal, Mr. Keller challenged on due process grounds the failure to require proof beyond a reasonable doubt that he had been convicted of two "most serious offenses;" and challenged the sentence as violating the Eighth Amendment.[12] The Washington Court of Appeals affirmed the conviction and sentence. *State v. Keller*, 98 Wash. App. 381, 990 P.2d 423 (1999). It specifically rejected these two issues in the unpublished portion of its opinion, at pages 16-21.

Mr. Keller again raised the due process and Eighth Amendment challenges to the Washington Supreme Court.[13] The Washington Supreme Court granted review

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[11] *State v. Woolfolk*, 95 Wash. App. 541, 546, 977 P.2d 1 (1999).

[12] Brief of Appellant, Assignments of Error 6, 10 & 11, at 1-2, 70-72 (Appendix I); Pro Se Supplemental Brief of Appellant, Assignments of Error 2 & 4, 28-30 (Appendix J).

[13] Supplemental Pro Se Petition for Review (Appendix K).

on June 6, 2000, limiting its review to "the persistent offender issue."[14]

Twenty days after review was granted in Mr. Keller's case, this Court issued its opinion in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000).

Mr. Keller briefed the POAA issue in light of *Apprendi*. The Washington Supreme Court permitted a brief by Amicus Curiae Washington Association of Criminal Defense Lawyers on the effect of *Apprendi* on the POAA. The state moved to strike those portions of Petitioner's supplemental brief. The Supreme Court permitted "full oral argument . . . on all matters referred to in Petitioner's supplemental brief." Nevertheless, when it ultimately issued its opinion, it granted the state's motion to strike and declined to address the issue on the merits. *State v. Keller*, 143 Wash. 2d at 281. It affirmed Mr. Keller's conviction and sentence without addressing this issue under the United States Constitution. It thus let stand the Washington Court of Appeals opinion on these issues, denying Mr. Keller any relief.

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[14] Order Granting Review, Appendix D. Contrary to the Supreme Court's reference in its opinion, Appendix A-6 at n. 20, the Order Granting Review did not limit the issue to "the persistent offender issue **discussed in the published portion of the Court of Appeals opinion.**"

REASONS FOR GRANTING THE WRIT

1. THE WASHINGTON STATE COURTS HAVE DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISION IN *APPRENDI v. NEW JERSEY* AND THE NINTH CIRCUIT'S DECISION IN *UNITED STATES v. TIGHE.*

> At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," Amdt. 14, and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," Amdt. 6. Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."

Apprendi v. New Jersey, supra, 530 U.S. at 476-77.

Mr. Apprendi was convicted of possession of a firearm for unlawful purpose, a New Jersey crime that carried a maximum sentence of ten years. The sentencing court determined, after a contested evidentiary hearing, that Mr. Apprendi's motive qualified as a "hate crime." Another New Jersey statute permitted an "enhanced" sentence based on this finding, of up to fifteen years. The court sentenced him to twelve years. This Court vacated that sentence as violating the Fourteenth Amendment's Due Process Clause and the Sixth Amendment jury trial guarantee.

> Other than **the fact** of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must

> be submitted to a jury, and proved beyond a reasonable doubt.

Apprendi, 530 U.S. at 490 (emphasis added).

Excepting from this rule "the fact of a prior conviction" was consistent with the Court's holding two years earlier in *Almendarez-Torres v. United States*, 523 U.S. 224, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998). In *Almendarez-Torres*, the defendant was convicted of illegal reentry of the United States after deportation. He was sentenced within a maximum of 20 years instead of 2 years based on having been deported after a conviction for an aggravated felony. He did not contest the fact of his prior conviction, nor that the prior conviction met the statutory definition of "aggravated felony." This Court held, under these facts, that the conviction of the "aggravated felony" was not an "element" of the offense that needed to be charged, tried to a jury, and proven beyond a reasonable doubt.

Nonetheless, the *Apprendi* Court acknowledged:

> Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi does not contest the decision's validity and we need not revisit it for our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. **Given its unique facts**, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence.

Apprendi, 530 U.S. at 489-90.

The *Apprendi* opinion at the very least greatly limited the holding of *Almendarez-Torres*.[14] *"Almendarez-Torres* represents at best an exceptional departure from the historic practice that we have described." *Apprendi*, 530 U.S. at 487.

> Both the certainty that procedural safeguards attached to any "fact" of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that "fact" in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a "fact" increasing punishment beyond the maximum of the statutory range.

Apprendi, 530 U.S. at 488.

The Ninth Circuit Court of Appeals has recognized the distinction between the "fact" of a prior conviction and the quality of that conviction. In *United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001), it held that a prior

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[14] Indeed, entire portions of the *Almendarez-Torres* opinion are clearly irreconcilable with the *Apprendi* opinion. See, *e.g.*, reliance on "Congressional intent" and comparison of federal statutes imposing greater maximum penalties on drug offenses for judicially found amounts of drugs, *Almendarez-Torres*, 523 U.S. at 235-36; and discussion of *McMillan v. Pennsylvania*, *id.* at 242-43. Since *Apprendi*, the Court of Appeals have struck down drug offense enhancements unless charged and proven to a jury beyond a reasonable doubt. *See, e.g., United States v. Dinnall*, ___ F.3d ___, 2001 WL 1229174 (No. 99-4936, 4th Cir. Oct. 15, 2001); *United States v. Cotton*, 261 F.3d 397 (4th Cir. 2001); *United States v. Promise*, 255 F.3d 150 (4th Cir. 2001); *United States v. Strayhorn*, 250 F.3d 462, 469-70 (6th Cir. 2001); *United States v. Ramirez*, 242 F.3d 348, 350 (6th Cir. 2001); *United States v. Flowal*, 234 F.3d 932, 936 (6th Cir. 2000).

juvenile conviction could not be used to increase a sentence beyond the statutory maximum for the offense, despite the terms of the Armed Career Criminal Act. The court concluded *Apprendi*'s "narrow 'prior conviction' exception is limited to prior convictions resulting from proceedings that afforded the procedural necessities of a jury trial and proof beyond a reasonable doubt."

> The *Apprendi* Court's serious reservations about the reasoning of *Almendarez-Torres* counsel against any extension of that opinion's holding.

Tighe, 266 F.3d at 1194.[15]

As in *Tighe*, petitioner's issue is not "the fact of" a prior conviction; it is the disputed quality of that conviction. Does due process entitle petitioner to the procedural protections to have the state prove to a jury, beyond a reasonable doubt, that an out-of-state prior conviction the current sentencing court found "comparable" to a non-"strike," nonetheless carried a "deadly weapon verdict under RCW 9.94A.125," when such a verdict can only be obtained with a special allegation and a jury finding beyond a reasonable doubt that there was such a deadly weapon used?

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[15] *But see*: *United States v. Santiago*, 268 F.3d 151 (2d Cir. 2001) (*Apprendi* leaves to judge task of finding not only the mere fact of previous convictions but also whether priors were committed on "different occasions" within 28 U.S.C. § 924(e); need not decide here if extends to all issues related to recidivism); *United States v. Martinez-Garcia*, 268 F.3d 460 (7th Cir. 2001) (proper for federal sentencing court to determine whether predicate conviction from state court meets definition of federal statute).

> "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," . . . trial by jury has been understood to require that *"the truth of every accusation,* whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . ." . . .
>
> Equally well founded is the companion right to have the jury verdict based on proof beyond a reasonable doubt.

Apprendi, 530 U.S. at 477-78 (emphasis of the Court).

The *Apprendi* Court condemned the use of court-determined factors, proven by a preponderance of evidence, to increase the maximum penalty that could be imposed.

> When a judge's finding on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as "a tail which wags the dog of the substantive offense."

Apprendi, 530 U.S. at 494. Here not only did the court's findings result in an increased maximum **possible** penalty; it **mandated**, beyond any discretion, the maximum sentence humanly possible short of death: life without the possibility of parole. Such consequences of findings made from disputed facts require the greatest procedural protections available under our Constitution.

The evolving disparity among the various circuits of United States Court of Appeals, and state courts, as they

grapple with the logical inconsistency between *Apprendi* and *Almendarez-Torres* call for this Court to grant certiorari in this case, and to re-examine and overrule *Almendarez-Torres*.

2. THE WASHINGTON STATE COURTS HAVE DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT VIOLATES THE EIGHTH AMENDMENT, AND CONFLICTS WITH THIS COURT'S OPINIONS IN *RUMMEL v. ESTELLE*, *SOLEM v. HELM*, AND *HARMELIN v. MICHIGAN*, AND THE NINTH CIRCUIT'S DECISION IN *ANDRADE v. ATTORNEY GENERAL OF CALIFORNIA*.

The Eighth Amendment to the United States Constitution provides that there "shall not be . . . cruel and unusual punishments inflicted." The Eighth Amendment "applies against the States by virtue of the Fourteenth Amendment." *Harmelin v. Michigan*, 501 U.S. 957, 962, 115 L. Ed. 2d 836, 111 S. Ct. 2680 (1991) (opinion of Justice Scalia, joined by Chief Justice Rehnquist) (citing *Robinson v. California*, 370 U.S. 660, 8 L. Ed. 2d 758, 82 S. Ct. 1417 (1962)).

As applied in this case, the Persistent Offender Accountability Act violates the Eighth Amendment's prohibition against cruel and unusual punishment.

Defining "cruel and unusual" depends on the current standards of society. "The Eighth Amendment must draw its meaning from evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101, 2 L. Ed. 2d 630, 78 S. Ct. 590 (1958); *Solem v. Helm*, 463 U.S. 277, 291 n.17, 77 L. Ed. 2d 637, 103 S. Ct.

3001 (1983) ("no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment").

Although most often applied in capital cases, proportionality analysis is required for felony sentences such as Mr. Keller's, which are the product of recidivist statutes. *Harmelin v. Michigan*, 501 U.S. 957, 115 L. Ed. 2d 836, 866, 111 S. Ct. 2680 (1991) (Kennedy, O'Connor, and Souter, JJ., concurring);[16] *Andrade v. Attorney General of California*, ___ F.3d ___, 2001 WL 1346065 (No. 99-55691, 9th Cir. Nov. 2, 2001). Where the crime committed and the sentence imposed are grossly disproportionate, the sentence is unconstitutional. *Harmelin*, 115 L. Ed. 2d at 871-72; *Hart v. Coiner*, 483 F.2d 136, 143 (4th Cir. 1973); *Andrade, supra.*

In *Rummel v. Estelle*, 445 U.S. 263, 63 L. Ed. 2d 382, 100 S. Ct. 1133 (1980), this Court upheld a Texas sentence of life imprisonment with the possibility of parole for a three-time non-violent felony recidivist. Among the factors that influenced this Court's decision was Texas's liberal parole policy, making Rummel eligible for parole in as few as twelve years; and that prosecutors retained discretion to plea bargain or not invoke the recidivist

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[16] Although *Harmelin* had no majority opinion, seven justices favored some manner of proportionality review. Several circuits regard Justice Kennedy's opinion as "the rule of *Harmelin*" because it presented the "position taken by those Members who concurred in the judgment on the narrowest grounds . . . ." *Andrade, supra. See also United States v. Bland*, 961 F.2d 123, 128-29 (9th Cir. 1992); *Henderson v. Norris*, 258 F.3d 706, 709 (8th Cir. 2001); *United States v. Jones*, 213 F.3d 1253, 1261 (10th Cir. 2000).

statute "so as to screen out truly 'petty' offenders who fall within the literal terms" of the statute. *Id.* at 280-81.

In *Solem v. Helm*, 463 U.S. 277, 77 L. Ed. 2d 637, 103 S. Ct. 3001 (1983), this Court affirmed a decision of the Eighth Circuit holding unconstitutional a sentence of life imprisonment **without possibility of parole** for a seven-time non-violent felony recidivist. Mr. Helm's convictions included thefts, burglary, and driving while intoxicated. His seventh conviction, for uttering a "no account" check, ordinarily would have carried a maximum of five years, but the recidivist statute placed him in prison for life without parole.

The *Solem* Court undertook a three-part analysis for proportionality:

> (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.

Id. at 292. Under this analysis, this case conflicts with these precedents.

a. Gravity of Offense and Harshness of Penalty

In *Harmelin*, Justice Kennedy concluded that courts need not examine the second and third factors specified in *Solem* unless a "threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Harmelin*, 501 U.S. at 1004. Justice Kennedy observed that Harmelin's crime involved possessing enough cocaine for 32,500-65,000

doses, and concluded it was "as serious and violent as the crime of felony murder without specific intent to kill." *Id.* at 1002.

An inference of gross disproportionality is found here in the distinction between a maximum penalty of five years in prison, and a mandatory non-reducible sentence of life without parole for a crime that did not involve any criminal intent and did not kill anyone. *See Andrade, supra; United States v. Meirovitz,* 918 F.2d 1376, 1381 (8th Cir. 1990) (analysis under second prong is "rare," but appropriate where sentence is life without possibility of parole).

b. Sentences Imposed on Other Criminals in the Same Jurisdiction

As noted above, the POAA was passed by citizen initiative.

At the time of its passage, only three Class C felonies were listed as "strikes:" second degree manslaughter, third degree rape, and vehicular assault. Otherwise a Class C felony could only become a strike if it had a "special finding" (charged and proven to a jury beyond a reasonable doubt) of a deadly weapon. Former RCW 9.94A.030(21) ("most serious offense"). Because it was passed by initiative, it did not result from the debate and negotiation process typical of legislation; the voters either accepted the entire list of offenses or rejected the concept of imprisoning repeat offenders.

Aside from the POAA, a sentence of life in prison without the possibility of parole is available only for a

person convicted of premeditated murder with special aggravating factors. The life sentence without parole is the only alternative to a death sentence for that offense. RCW ch. 10.95. It is not available for serial murders or felony murders.

At the time of Mr. Keller's offense, aside from the POAA, the maximum presumptive sentence for non-aggravated first-degree murder, even assuming a criminal history of nine or more prior felonies, was 548 months (45 years eight months). RCW 9A.32.030, 9.94A.310-.320. The same sentence applied for homicide by abuse, RCW 9A.32.055. For first degree rape, it was 280 months (23 years four months).

Although vehicular assault is not a trivial offense, it is less serious than the offenses listed above, which are without question representative of the most onerous crimes defined in Washington. Indeed, the Washington Legislature has ranked vehicular assault at a seriousness level IV out of a possible XV. It is equivalent to theft of livestock, escape in the first degree, and willful failure to return from furlough. RCW 9.94A.320. For these offenses, the presumptive range sentence, even with an offender score of nine prior felonies, would be 84 months (seven years) – or the statutory maximum of five years, whichever was less. RCW 9.94A.310.

Mr. Keller's sentence is grossly disproportionate when compared to the more serious crimes above.

c. Sentences Imposed for the Same Crime in Other Jurisdictions

The Washington POAA lists 51 separate offenses as "strikes." "It incorporates the longest list of eligible felonies of any similar legislation found in any state of the union." *State v. Rivers*, 129 Wash. 2d 697, 716-17, 921 P.2d 495 (1996) (Sanders, J., dissenting), citing Michael G. Turner, et al., *"Three Strikes and You're Out" Legislation: A National Assessment*, 59 Fed. Probation 16, 25 (Sept. 1995).

By 1997 there were recidivist statutes in effect in at least 40 states. *Andrade, supra.*[17] Of those, however, only

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[17] In addition to Washington, they include: Alabama (Ala.Code, § 13A-5-9), Arizona (Ariz.Rev.Stat., § 13-604), Arkansas (Ark.Code, § 5-4-501), Colorado (Colo.Rev.Stat., § 16-13-101), Connecticut (Conn.Gen.Stat., § 53a-40), Delaware (Del.Code, tit. 11, § 4214), Florida (Fla.Stat., § 775.084), Georgia (Ga.Code, § 17-10-7), Hawaii (Haw.Rev.Stat., § 706-606.5), Idaho (Idaho Code, § 19-2514), Illinois (Ill.Stat., ch. 720, § 33B-1), Indiana (Ind.Code, § 35-50-2-8.5), Kansas (Kan.Stat., § 15:529.1), Maryland (Md.Code, art. 27, § 643B), Michigan (Mich. Comp. Laws, § 769.12), Mississippi (Miss.Code, § 99-19-83), Missouri (Mo.Stat., § 558.016), Montana (Mont.Code, § 46-18-501), Nebraska (Neb.Rev.Stat., § 29-2221), Nevada (Nev.Rev.Stat., § 207.010), New Hampshire (N.H.Stat., § 651:6), New Jersey (N.J.Stat., §§ 2C:44-3, 2C:43-7), New York (N.Y. Penal Law, § 70.08), North Carolina (N.C.Gen.Stat. §§ 14-7.1, 14-7.6), North Dakota (N.D.Cent.Code, § 12.1-32-09), Oklahoma (Okla.Stat., tit.21, § 51), Oregon (Ore.Rev.Stat., § 161.725), Rhode Island (R.I.Gen.Laws, § 12-19-21), South Carolina (S.C.Code, § 17-25-45), South Dakota (S.D. Codified Laws, § 22-7-8), Tennessee (Tenn.Code, §§ 40-35-106, 40-35-107, 40-35-108), Texas (Tex. Penal Code, § 12.42), Utah (Utah Code, § 76-8-1001), Vermont (Vt.Stat., tit.13, § 11), Virginia (Va.Code, § 19.2-297.1), West Virginia (W.Va. Code, § 61-11-18), and Wyoming (Wyo.Stat., § 6-10-201).

four permitted sentences of life without the possibility of parole: Alabama, Indiana, Mississippi, and South Carolina.

Of these four states, Mr. Keller's conviction for vehicular assault and his prior convictions would not qualify him for such a sentence in Alabama,[18] Indiana,[19] or South Carolina.[20] Although he would be eligible for such a sentence in Mississippi, it would require a separate "habitual offender charge" in the indictment, and proof to a jury beyond a reasonable doubt[21] – precisely the procedural protections missing from Washington's statute. Thus such an outcome would require the exercise of at least prosecutorial discretion, permitting the imposition of the sentence only on the "worst of the worst."

Sentences in states near Washington would not approach life without parole. In Oregon or Alaska, Mr. Keller could have been subjected to, at most, five years in prison for vehicular assault. Alaska Statutes 12.55.125(e); Oregon Revised Statutes § 161.605. The offense would not

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[18] Alabama imposes life without the possibility of parole only on a Class A felony where the offender has three prior felony convictions, at least one of which was also a Class A felony. Ala. Code § 13A-5-9(c)(4).

[19] Indiana permits such a sentence for operating a vehicle while intoxicated, but only if the person has committed at least two prior operating vehicle while intoxicated offenses. Ind.Code 35-50-2-2(b)(4)(Q). The sentence is still discretionary with the prosecutor, and must be separately charged and proven to a jury beyond a reasonable doubt. Ind.Code 35-50-2-8.5.

[20] Vehicular assault does not fall within South Carolina's recidivist statute. S.C.Code § 17-25-45.

[21] *Feazell v. State*, 761 So.2d 140 (Miss. 2000).

have brought him within Oregon's recidivist "dangerous offender" statute. Even if he had, he would have faced a 30-year sentence, not life without the possibility of parole. Oregon Revised Statutes § 161.725-735.

In California, a third-time offender is sentenced to

> an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of [three times the term otherwise provided; 25 years; or the term that would have been imposed with certain enhancements].

Cal. Penal Code § 667(e)(2)(A).

In *Andrade, supra,* the Ninth Circuit Court of Appeals held California's Three Strikes law was cruel and unusual as applied to a man who committed two thefts by shoplifting. He had prior convictions for three counts of first degree burglary (residential burglary), two transportations of marijuana (a federal felony), another theft, and escape from federal prison.

Under California law, the prosecutor had the option of charging the shoplifting as misdemeanors; the trial court even had reviewable discretion to reduce the charges to misdemeanors at sentencing. Charged as felonies, however, they became "third strikes" with the prior burglaries the first and second strikes. Mr. Andrade was sentenced to two consecutive minimum terms of 25 years each, with no possibility of parole.

The Ninth Circuit Court of Appeals reviewed comparable statutes in other states. In Rhode Island, for example, the habitual offender sentencing scheme allowed the judge discretion to determine how many years to impose

before parole was permitted. R.I. Gen. Laws § 12-19-21. California's scheme, which required a mandatory minimum term of 25 years, compared unfavorably. *Andrade, supra.* Of course, Washington's law requires a mandatory life sentence without parole. It does not have to be separately alleged; the sentence is automatic. There is no discretion for anyone. RCW 9.94A.120(4).

The Texas habitual offender statute could impose up to 20 years in prison per offense; but Texas law permits parole after less than one-fourth of the sentence is completed. Tex. Penal Code § 12.42(a)(2), 12.33; Tex. Govt. Code § 508.145(f); *Andrade, supra.* In comparison, Washington imposes a life sentence that does not permit parole at any time.

d. Conclusion

Compared with the sentences that would be imposed in other jurisdictions for this Class C felony, even with the two prior felonies, Mr. Keller's sentence of life without the possibility of parole is grossly disproportionate. This is particularly true given the lack of procedural safeguards and discretion permitted any party to the justice system. Even in these days of "getting tough on crime," this draconian sentence is cruel and unusual. The Washington courts' willingness to uphold it conflicts with this Court's decisions in *Rummel, Solem,* and *Harmelin,* and the Ninth Circuit's decision in *Andrade* on this important federal question.

CONCLUSION

For the foregoing reasons, Petitioner Keller respectfully asks that this Court issue a writ of certiorari to the Washington Supreme Court in this case.

Respectfully submitted this 14th day of November, 2001.

LENELL NUSSBAUM
Attorney for Lawrence Keller

APPENDICES

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J: Excerpt from Pro Se Brief of Appellant J-1

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APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. LAWRENCE JOHN KELLER, Petitioner.	)	Number 68993-8
	)	En Banc
	)	Filed MAR 22 2001

SMITH, J. – Petitioner Lawrence John Keller seeks review of a decision of the Court of Appeals, Division One, which affirmed his conviction in the King County Superior Court for vehicular assault under former RCW 46.61.522(1)(b) and felony hit and run under RCW 46.52.020.[1] Petitioner was determined to be a persistent offender with three "strikes," thus subjecting him to the penalty of life imprisonment under the Persistent Offender Accountability Act (Persistent Offender Act).[2] The Court of Appeals concluded the phrase "included in the offender score under [former] RCW 9.94A.360" in former RCW 9.94A.030(25)(b) refers specifically to the "washout" provision in former RCW 9.94A.360(2), and thus Petitioner's two prior felony convictions would be included as "strikes" under the Persistent Offender Act.

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[1] *State v. Keller*, 98 Wn. App. 381, 990 P.2d 423 (1999).

[2] *Id.* at 390; former RCW 9.94A.030(25).

This court granted review limited to the persistent offender issue. We affirm.

QUESTION PRESENTED

The question presented in this case is whether two prior felony convictions which count as one offense in the calculation of an offender score because the sentences were served concurrently may nevertheless be counted as two prior convictions in determining "strikes" under the Persistent Offender Act.

STATEMENT OF FACTS

Petitioner Lawrence John Keller on December 21, 1994 was charged by information in the King County Superior Court with one count of vehicular assault under former RCW 46.61.522(1)(b) and on May 16, 1996 by amended information with one count of vehicular assault under former RCW 46.61.522(1)(b), a class C felony; one count of hit and run – felony under RCW 46.52.020(4), a class C felony; and one count of assault in the second degree under former RCW 9A.36.020(1)(f), repealed by Laws of 1986, ch. 257, §9, a class B felony. The charges arose out of an automobile collision in Seattle, Washington on October 16, 1994.[3]

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[3] The State of Washington originally charged Petitioner on December 21, 1994 with one count of vehicular assault under former RCW 46.61.522(1)(b) and with one count of assault in the fourth degree under former RCW 9A.36.041. Clerk's Papers at 1-2. The State amended the information on May 16, 1996 to charge Petitioner with hit and run – felony under former RCW

On August 5, 1995 Petitioner was found "guilty" of hit and run – felony and assault in the second degree.[4] On August 6, 1995 a mistrial was declared because of prosecutorial misconduct and a new trial was ordered.[5] In the retrial, the jury on January 8, 1996 found Petitioner Keller "guilty" of vehicular assault under former RCW 46.61.522(1)(b) and felony hit and run under RCW 46 .52.020.[6]

At the sentencing hearing on February 18, 1997, the trial court, the Honorable Joan E. DuBuque, concluded it was established by the State that Petitioner "had two prior convictions, and that they . . . qualify under the Persistent Offender Act. . . . "[7] The court then indicated its intention to impose sentence as follows:

> In Count I, in accordance with the law, the Court is going to impose the sentence of life imprisonment, without the possibility of parole, or early release. . . . [and Petitioner] is to be given credit for time served of three hundred seventy days.[8]

Petitioner was previously convicted of second degree assault in Washington in 1979 and convicted of aggravated assault in Arizona in 1983. He served his sentences

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46.52.020 and assault in the second degree under former 9A.36.020(1)(f) instead of assault in the fourth degree. Clerk's Papers at 220-21.

[4] Clerks Papers at 254-55.

[5] Clerks Papers at 258.

[6] Clerk's Papers at 405.

[7] Report of Proceedings at 2821.

[8] Report of Proceedings at 2826.

in those cases concurrently.[9] The trial court counted Petitioner's two prior convictions as "two strikes"[10] and this vehicular assault conviction as a "third strike" under the Persistent Offender Act. The court on February 18, 1997 signed a judgment and sentence finding that petitioner was a persistent offender and sentencing him to life in prison without early release.[11] Petitioner appealed the decision to the Court of Appeals, Division One, on February 21, 1997.[12]

Under the Persistent Offender Act, former RCW 9.94A.030(25) stated that an offense would be considered a "strike" only if it "would be included in the offender score under RCW 9.94A.360."[13] Petitioner claims this phrase refers to the entire statute, including former RCW 9.94A.360(6)(c), which contained language that "[i]n the case of multiple prior convictions committed before July 1, 1986, for the purpose of computing the offender score, [the sentencing court must] count all adult convictions

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[9] Clerk's Papers at 707.

[10] *Id.*

[11] *Id.* at 433.

[12] Clerk's Papers at 436.

[13] Former RCW 9.94A.030(25)(b) defined "Persistent offender" as one who: "Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.360. . . . " The statute, in almost identical wording, is now codified as RCW 9.94A.030(29)(b)(ii).

served concurrently as one offense. . . . "[14] Petitioner claims that since the sentences for his two prior felony convictions were served concurrently, they should only count as "one strike" under the Persistent Offender Act.[15] Respondent State of Washington asserts the phrase in the Act refers only to subsection (2), the "washout" provision of RCW 9.94A.360.[16] Respondent argues that Petitioner's two prior felony convictions should count as "two strikes," even though the sentences were served concurrently, because neither of them "washed out" under RCW 9.94A.360(2) which provides, in part, "Class A and sex prior felony convictions shall always be included in the offender score."[17]

On December 13, 1999, the Court of Appeals, the Honorable Ronald E. Cox writing, affirmed the trial court's decision and held "the phrase 'included in the offender score under [former] RCW 9.94A.360' as used in former RCW 9.94A.030(25) refers specifically to the washout provisions set forth in former RCW 9.94A.360(2)"[18]

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[14] "Petition for Discretionary Review" at 7, 12. Former RCW 9.94A.360(6)(c) provided "In the case of multiple prior convictions for offenses committed before July 1, 1986, for the purpose of computing the offender score, count all adult convictions served concurrently as one offense, and count all juvenile convictions entered on the same date as one offense. Use the conviction for the offense that yields the highest offender score." The statute, in identical wording, is now codified as RCW 9.94A.360(5)(a)(ii).

[15] *Id.* at 10.

[16] Supplemental Br. of Resp't at 5.

[17] *Id.*

[18] *Keller*, 98 Wn. App. at 390.

and that "[t]he phrase is not interchangeable with the provisions of former RCW 9.94A.360(6)(c)." The Court of Appeals agreed with the trial court and concluded Petitioner Keller's prior felony convictions counted as two strikes and that he was a persistent offender under the Persistent Offender Act.[19]

On December 30, 1999 Petitioner filed a motion for discretionary review in this court. On June 30, 2000, this court granted review limited to the persistent offender issue.[20]

DISCUSSION

Former RCW 9.94A.030(25) provided:

> (25) "Persistent offender" is an offender who:
>
> (a) Has been convicted in this state of any felony considered a most serious offense; and
>
> (b) Has, before the commission of the offense under (a) of this subsection, been *convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.360;* provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious

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[19] *Id.*

[20] Review was granted only on the persistent offender issue discussed in the published portion of the Court of Appeals opinion.

> offenses for which the offender was previously convicted.[21]

Under RCW 9.94A.120(4) "[a] persistent offender shall be sentenced to a term of total confinement for life without the possibility of parole" unless sentenced to death under RCW 10.95.030.

Petitioner claims the phrase "would be included in the offender score under RCW 9.94A.360" applies to the entire Sentencing Reform Act of 1981, including former RCW 9.94A.360(6)(c), which read:[22]

> In the case of multiple prior convictions for offenses committed before July 1, 1986, *for the purpose of computing the offender score, count all adult convictions served concurrently as one offense,* and count all juvenile convictions entered on the same date as one offense. Use the conviction for the offense that yields the highest offender score.

Petitioner claims that since the sentences under his two prior felony convictions were served concurrently and counted as only one conviction for the purpose of computing his offender score, under former RCW 9.94A.360(6)(c) those convictions should count only as one "strike" under the Persistent Offender Act.[23] Respondent argues the words "one offense" in subsection (c)

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[21] (Emphasis added.) Former RCW 9.94A.030(25) is now codified as RCW 9.94A.030(29)(6)(ii).

[22] Pet. for Discretionary Review at 7, 12 (emphasis added). Former RCW 9.94A.360(6)(c) is now codified as RCW 9.94A.360(5)(a)(ii).

[23] *Id.* at 7.

refer to the "washout" provision of former RCW 9.94A.360(2).[24] Respondent reasons that Petitioner's two prior felony convictions, the sentences for which were served concurrently, should count as two "strikes" under the Persistent Offender Act unless they were "washed out" under subsection (2).[25]

The "wash out" portion of the offender score statute in former RCW 9.94A.360(2) and the out-of-state conviction section in (3) read:

> (2) Except as provided in subsection (4) of this section, class A and sex prior felony convictions shall always be included in the offender score. Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without being convicted of any felonies. Class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without being convicted of any felonies. Serious traffic convictions shall not be included in the offender score if, since the last

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[24] The language in the current version of the statute is substantially identical to the language in the former version.

[25] Supplemental Br. of Resp't at 5.

> date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender spent five years in the community without being convicted of any serious traffic or felony traffic offenses. This subsection applies to both adult and juvenile prior convictions.
>
> (3) Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law.

The Court of Appeals affirmed the decision of the trial court, which concluded the "one offense" language in former RCW 9.94A.360(6)(c) refers only to the "wash out" provision of former RCW 9.94A.360 and sentenced Petitioner Keller to life in prison without the possibility of parole or early release.[26] The principal question to be determined by this court is whether the phrase "would be included in the offender score under 9.94A.360" refers to all other sections of the Sentencing Reform Act of 1981, chapter 9.94A RCW.

Statutory interpretation is a question of law, which this court reviews *de novo*.[27] Courts should assume the

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[26] *Keller*, 98 Wn. App. at 390.

[27] *W. Telepage, Inc. v. Tacoma Dep't of Financing*, 140 Wn.2d 599, 607, 998 P.2d 884 (2000) (citing *Enterp. Leasing, Inc. v. City of Tacoma* 139 Wn.2d 546, 988 P.2d 961 (1999)).

Legislature means exactly what it says.[28] Plain words do not require construction.[29] The courts do not engage in statutory interpretation of a statute that is not ambiguous.[30] If a statute is plain and unambiguous, its meaning must be derived from the wording of the statute itself.[31] A statute is ambiguous if it can reasonably be interpreted in two or more ways, but it is not ambiguous simply because different interpretations are conceivable.[32] The courts are not "obliged to discern any ambiguity by imagining a variety of alternative interpretations."[33]

In this case the phrase "would be included in the offender score under RCW 9.94A.360" cannot reasonably be interpreted to mean anything but what it says. The phrase refers to the entire offender score statute, RCW 9.94A.360, and does not limit its application to one section or subsection.[34] In this case we must assume the Legislature meant exactly what it said.[35] We conclude the statute is not ambiguous.

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[28] *W. Telepage*, 140 Wn.2d at 609 (*citing State v. McCraw*, 127 Wn.2d 281, 288, 898 P.2d 838 (1995) (quoting *Sidis v. Brodie/ Dohrmann, Inc.* 117 Wn.2d 325, 329, 815 P.2d 781 (1991))); *State v. Smith*, 117 Wn.2d 263, 271, 814 P.3d 652 (1991).

[29] *Id.*

[30] *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (citing *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)).

[31] *State v. Tili*, 139 Wn.2d 107, 115, 985 P.2d 365 (1999).

[32] *Id.*

[33] *W. Telepage*, 140 Wn.2d at 608.

[34] *Id.*

[35] *Id.*

When the language of a statute is clear and unambiguous the meaning is derived from the words of the statute itself.[36] When construing a statute we read the statute in its entirety.[37] "Each provision must be viewed in relation to other provisions and harmonized, if at all possible. . . . "[38] Statutes must be construed so that all language is given effect with no portion rendered meaningless or superfluous.[39] The court must also avoid constructions "that yield unlikely, strange or absurd consequences."[40]

Respondent argues that Petitioner's proposed construction would lead to absurd results, rewarding offenders simply because they committed their second offense while on parole and served their sentences concurrently.[41] Respondent suggests Petitioner's interpretation would render RCW 9.94A.360(2) superfluous because class A and prior sex felony convictions would not under

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[36] *Tili*, 139 Wn.2d at 115.

[37] *In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 249, 955 P.2d 798 (1998); *see State v. Thorne*, 129 Wn.2d 736, 762-63, 921 P.2d 514 (1996).

[38] *Thorne*, 129 Wn.2d at 761; *see State v. Young*, 125 Wn.2d 688, 888 P.2d 142 (1995).

[39] *Davis*, 137 Wn.2d at 963 (citing *Whatcom County*, 128 Wn.2d at 546 (citing *Stone v. Chelan County Sheriff's Dep't*, 110 Wn.2d 806, 810, 756 P.2d 736 (1988))).

[40] *State v. Contreras*, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994) *see Upjohn v. Russell*, 33 Wn. App. 777, 780, 658 P.2d 27 (1983).

[41] Supplemental Br. of Resp't at 14. Petitioner was on parole in Washington when he was convicted in Arizona in 1983.

that circumstance be separately counted in the offender score if the sentences were served concurrently.[42]

Under Petitioner's interpretation, even sentences for two or more class A, including prior sex felonies, which were served concurrently would not be separately counted in the offender score. That interpretation is inconsistent with subsection (2) of RCW 9.94A.360 which states that "[c]lass A and sex prior felonies *shall always* be included in the offender score."[43] Petitioner's interpretation would render RCW 9.94A.360(2) meaningless or superfluous. The phrase "would be included in the offender score under RCW 9.94A.360" refers to the entire statute, RCW 9.94A.360. It does not apply only to subsection 6(c). We must construe the language to give meaning to the entire statute.[44]

Petitioner claims the Legislature intended the words "include" and "count" to have the same meaning because they have historically been used interchangeably and have similar definitions.[45] Respondent answers that the Legislature intentionally used different words in the statute and that it intended "include" and "count" to have different meanings.[46] The Court of Appeals reasoned it could be inferred that the words "include" and "count" were intended to have different meanings because they

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[42] *Id.* at 17.

[43] RCW 9.94A.360(2) (emphasis added).

[44] *Davis*, 137 Wn.2d at 963 (citing *Whatcom County*, 128 Wn.2d at 546).

[45] Pet. for Discretionary Review at 10-11.

[46] Supplemental Br. of Resp't at 11-12.

are two different words used in the same statute.[47] If the Legislature uses "specific language in one instance and dissimilar language in another, a difference in legislative intent may be inferred."[48] When the Legislature uses different words in the same statute, it usually means it intended the words to have different meanings. However, the courts must look at the entire statute and interpret the provisions to give meaning to all parts of it.[49] In reading the entire Sentencing Reform Act of 1981, chapter 0.94A [sic] RCW, we conclude the word "included" in RCW 9.94A.030(25)(b) and the word "count" in RCW 9.94A.360(6)(c) have different meanings.

Petitioner argues the Court of Appeals was in error in concluding his two prior felony convictions should be separately counted under the Persistent Offender Act because those convictions are counted as only one offense when calculating his offender score.[50] He cites *State v. Cruz* to support his assertion that the Persistent Offender Act was referring to the entire statute, including subsection (6)(c).[51]

In *Cruz* the court determined whether a rape conviction which was previously washed out could figure into the defendant's offender score when a statutory amendment was later adopted stating sex felonies could never

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[47] *Keller*, 98 Wn. App. at 387.

[48] *In Personal Restraint of Sietz*, 124 Wn. 2d 645, 651, 880 P.2d 34 (1994).

[49] *Id.*

[50] Pet. for Discretionary Review at 10; *State v. Cruz*, 139 Wn.2d 186, 985 P.2d 384 (1999).

[51] Supplemental Br. of Pet'r at 19-20.

wash out.[52] The court held the new statute applied prospectively only and did not revive the defendant's previously washed out conviction.[53] The court concluded defendant Cruz' criminal history did not include his prior conviction which had washed out,[54] stating that "a conviction for purposes of implementing the [Persistent Offender Act] must also be a conviction that forms part of the defendant's offender score."[55]

Petitioner's reliance on *Cruz* is misplaced. The court concluded Mr. Cruz' prior conviction washed out, was no longer part of his criminal history, and could not be included in his offender score.[56] It was thus not counted as a "strike" under the Persistent Offender Act.[57] The case did not involve concurrent sentences.

Petitioner cites *State v. Morley* in which the defendant was sentenced to life imprisonment under the Persistent Offender Act after pleading "guilty" to three counts of second degree child molestation counting as his third "strike."[58] He challenged his second offense, a military general court-martial in which he was found "guilty" of robbery and assault.[59] The court concluded the court-martial conviction should be included in the offender

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[52] *Cruz*, 139 Wn.2d at 189.

[53] *Id.* at 193.

[54] *Id.*

[55] *Id.* at 190.

[56] *Id.* at 193.

[57] *Id.*

[58] *State v. Morley*, 134 Wn.2d 588, 592, 952 P.2d 167 (1998).

[59] *Id.*

score and then decided it would count as a "strike" under the Persistent Offender Act.[60] The court declared four elements necessary for determining that a person is a persistent offender, the fourth element requiring that prior convictions "be included in the offender score under RCW 9.94A.360."[61] The court indicated that, to satisfy the fourth element, the conviction must be "comparable to a Washington offense and the conviction does not wash out."[62] The case did not involve concurrent sentences.

Petitioner also cites *State v. Berry* in which this court interpreted former RCW 9.94A.030(27)(a)(ii) (formerly subsection 25), under the Persistent Offender Act to determine whether the defendant's prior assault convictions would be considered "most serious offenses."[63] The court merely mentioned in a footnote that none of the defendant's prior convictions had washed out.[64] The case did not involve concurrent sentences.

Both Petitioner Keller and Respondent State filed supplemental briefs on September 6, 2000. The Washington Association of Criminal Defense Lawyers filed a brief amicus curiae on September 26, 2000. Respondent on September 29, 2000 filed a motion to strike pages 7 through 11 of Petititoner's [sic] supplemental brief. The

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[60] *Id.* at 602.

[61] *Id.* at 604.

[62] *Id.*

[63] *State v. Berry*, 141 Wn.2d 121, 130, 5 P.3d 658 (2000).

[64] *Id.*

motion was passed to the merits for consideration by the court at the time of oral argument.

Although full oral argument was allowed on all matters referred to in Petitioner's supplemental brief, we nevertheless grant Respondent's motion to strike pages 7 through 11 of Petitioner's supplemental brief relating to classification of Petitioner's 1983 conviction and sentence for aggravated assault under Arizona Revised Statute § 13-1204 as comparable to a "most serious offense," and consequently a "strike," under Washington's Persistent Offender Accountability Act.[65]

We are satisfied the trial court had before it sufficient certified documents (including the indictment, statement on plea of "guilty," judgment and sentence, and presentence report) from the State of Arizona to establish that Petitioner entered pleas of "guilty" on March 9, 1983 to two counts of an indictment which charged in Count I that:

> LAWRENCE JOHN KELLER, on or about the 1st day of MARCH, 1982, using a dangerous weapon or dangerous instrument, to-wit: a shotgun, intentionally placed ROBERT NEIL SNIDER in reasonable apprehension of imminent physical injury, in violation of A.R.S. §§ 13-1204(A)(2)(B), 13-1203(A)(2), 13-701, 13-702 and 13-801.[66]

The trial court during the sentencing hearing on February 18, 1997 concluded that Petitioner "had two prior convictions, and that they otherwise qualify under the

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[65] Clerk's Papers at 703-59.

[66] Clerk's Papers at 719-21, 753.

Persistent Offender Act. . . . " and specifically that the plea to aggravated assault "under Arizona law [was] equivalent . . . to a Class C Felony, . . . [which] makes it count" as a most serious offense under the Persistent Offender Act.[67]

Under RCW 9.94A.030(29), "most serious offense" means any of the specified felonies, including "[a]ssault in the second degree" under subsection (b) and "[v]ehicular assault" under subsection (q). Under RCW 9A.36.021(1)(c) "[a] person is guilty of assault in the second degree if [the person], under circumstances not amounting to assault in the first degree:. . . . [a]ssaults another with a deadly weapon;. . . . "

We conclude the trial court properly determined Petitioner's 1983 Arizona conviction for assault, "using a dangerous weapon or dangerous instrument . . . a shotgun, . . . intentionally [placing] Robert Neil Snider in reasonable apprehension of imminent physical injury," was comparable to assault in the second degree under Washington law and counts as a "strike" under our Persistent Offender Act.

We agree with the Court of Appeals and affirm its conclusion upholding the decision of the King County Superior Court.

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[67] Report of Proceedings at 2821, 2825.

SUMMARY AND CONCLUSIONS

The interpretation of a statute is a matter of law. Courts do not engage in statutory construction of a statute that is not ambiguous. Where a statute is unambiguous, the meaning must be derived from the wording of the statute itself. A statute is ambiguous when it can reasonably be interpreted in two or more ways.

The Court of Appeals correctly concluded former RCW 9.94A.030(25) was not ambiguous. The phrase "included in the offender score under RCW 9.94A.360" stated in the Persistent Offender Act refers to the entire statute and cannot reasonably be interpreted to mean two different things. The statute is not ambiguous, and thus is not subject to the rule of strict construction.

We affirm the decision of the Court of Appeals, Division One, which affirmed the judgment of the King County Superior Court holding that Petitioner Lawrence John Keller's two prior felony convictions counted as two "strikes" under the Persistent Offender Accountability Act, although they counted only as one conviction in calculating his offender score, and sentenced him to life imprisonment without the possibility of parole.

/s/ Smith, J.

/s/ Guy, J.P.T. /s/ Talmadge, J.P.T.

/s/ Ireland, J.

/s/ Bridge, J.

State v. Keller
Majority by Smith, J.
Dissent by Alexander, C.J.

No. 68993-8

ALEXANDER, C.J. (dissenting) – The Persistent Offender Accountability Act, commonly referred to as the "three strikes" law was passed by initiative and is subsumed within the Sentencing Reform Act of 1981 (SRA). It requires every "persistent offender" to be sentenced to life imprisonment without the possibility of parole. RCW 9.94A.120(4). As the majority observes, a persistent offender is one who is convicted in this state of "any felony considered a most serious offense" and has, before the commission of the latest offense:

> been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and *would be included in the offender score under RCW 9.94A.360;* provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted.

RCW 9.94A.030(29)(a)(i), (ii) (emphasis added).

There is no dispute about the fact that Lawrence Keller's current conviction for vehicular assault, as well as his prior conviction in this state for second degree assault, are most serious offenses. I also agree with the majority that Keller's prior Arizona conviction qualifies as a most serious offense. I disagree, though, with the

majority's conclusion that Keller falls within the definition of "persistent offender" on the basis that his prior convictions, both of which occurred before July 1, 1986, "would be included in the offender score under RCW 9.94A.360." RCW 9.94A.030(29)(a)(ii).

As the above definition of "persistent offender" indicates, RCW 9.94A.360 sets forth the rules for calculating the offender score for sentencing purposes. The Court of Appeals and the majority looked for language in that statute that echoed the "included in the offender score" language of RCW 9.94A.030(29)(a)(ii), finding it in subsection (2). In relevant part that subsection provides:

> Class A and sex prior felony convictions shall always be included in the offender score. Class B prior felony convictions other than sex offenses *shall not be included in the offender score,* if since the last date of release from confinement . . . pursuant to a felony conviction . . . the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction. Class C prior felony convictions other than sex offenses *shall not be included in the offender score* if, since the last date of release from confinement . . . pursuant to a felony conviction . . . the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.360(2) (emphasis added).

Under case law, offenses which "shall not be included in the offender score" pursuant to the above provision are said to have "washed out." *See State v. Cruz,* 139 Wash.2d 186, 189, 985 P.2d 384 (1999). In the view of

the Court of Appeals and the majority, this is the only provision to which the definition of "persistent offender" refers when it says that the defendant must have been convicted of two prison offenses that "would be included in the offender score." RCW 9.94A.030(29)(a)(ii). Since Keller did not remain crime-free long enough for his prior convictions to "washout" under RCW 9.94A.360(2), the Court of Appeals and the majority determined that his conviction would be "included" in his offender score and, therefore, count as two "strikes" against him under the "three strikes" law.

Keller argued at the Court of Appeals and here that his prior convictions are subject to another part of RCW 9.94A.360; specifically, subsection (5)(a)(ii). That provision states that "[i]n the case of multiple prior convictions for offenses committed before July 1, 1986, for purposes of computing the offender score, *count* all adult convictions served concurrently as one offense," using "the conviction for the offense that yields the highest offender score." (Emphasis added.) Keller reasons that because he committed his prior crimes before July 1, 1986, and served his sentences concurrently, those crimes "count" only as one for purposes of computing his offender score. He asserts, therefore, that only one crime is "included" in his offender score and he, therefore, has only one "strike."

The majority, like the Court of Appeals, has rejected Keller's argument. As noted above, it relies on the fact that only the washout provisions mirror the definition of "persistent offender" by using the phrase "included in the offender score," whereas RCW 9.94A.360(5)(a)(ii) says that concurrently served prior convictions shall "count"

as one offense in computing the offender score. The majority reasons that "[w]hen the Legislature uses different words in the same statute, it usually means it intended the words to have different meanings." Majority at 13. It concludes, therefore, that RCW 9.94A.030(29) unambiguously means that a prior conviction for a most serious offense is included in the offender score unless it is subject to the washout provisions in RCW 9.94A.360.

In concluding that the term "persistent offender" unambiguously refers only to the washout provisions, the majority is not swayed by the fact that the terms "count" and "include" have been used interchangeably by this court when discussing offender scores. *See State v. Morley*, 134 Wn.2d 588, 171, 952 P.2d 167 (1998). Furthermore, because it holds that the definition of "persistent offender" is unambiguous, it declines to give Keller the benefit of the rule of lenity.

The majority's decision is problematic and, as I indicated above, I disagree with it. On the last point mentioned above, it seems odd for the majority to devote significant space to analyzing legislative intent only to conclude that the statute is unambiguous. Also, the majority appears to have examined the intent behind the statute from the wrong perspective. The interpretation of the persistent offender statute is not a matter of gleaning the *Legislature's* intent. The so-called "three strikes" law was enacted by the people as an initiative. Thus, while the basic rules of construction are the same as those applicable to statutes passed by the Legislature, interpretation must focus on the collective intent of the voters. *State v. Thorne*, 129 Wn.2d 736, 763, 921 P.2d 514 (1996). Here the majority incorrectly analyzed the issue as a

matter of what the Legislature likely had in mind when it enacted the statute.

Addressing myself to the merits, the interaction between the persistent offender statute and the offender score provisions of the SRA seems at least ambiguous. Unquestionably, any offense not "included in the offender score" under the washout provisions would not count as a "strike" under the persistent offender statute, since the definition of "persistent offender" uses precisely the same language. It is not entirely clear, however, that the voters intended that only the washout provisions would govern whether a prior offense is "included in the offender score." Although RCW 9.94A.360(5)(a)(ii) contains the word "count" instead of "included," it cannot be said that the context in which that term is used is so different as to give it an entirely different meaning. As noted above, RCW 9.94A.360(5)(a)(ii) provides that all adult convictions before July 1, 1986, that were served concurrently are to be treated as one offense "for the purpose of computing the offender score," with the offense that yields the highest score being the one the sentencing court must "use." If the sentencing court may "use" only one of the prior offenses computing the offender score, then it is reasonable to assume that offense is "included" in the offender score. The fact that the word "count" was used rather than "included" in RCW 9.94A.360(5)(a)(ii) may simply indicate that the drafters believed it to be the more appropriate term under the circumstances. It is difficult to divine from that difference in terms any particular intent on the voters' part with respect to the "three-strikes" law.

While one could argue that considering prior concurrently served crimes as one offense is not entirely consistent with the intent expressed in RCW 9.94A.392 to more severely punish repeat serious offenders, neither is the application of the washout provisions. Even under those provisions, a defendant with multiple prior Class B felonies will not have strikes if that defendant has been crime-free for 10 years.

The majority makes the point that Keller's position is inconsistent with the portion of RCW 9.92A.360(2) that provides that "Class A and sex prior felony convictions shall always be included in the offender score." It observes, in that regard, that under Keller's interpretation multiple Class A or sex offenses that were committed before July 1, 1986, and served concurrently, would be considered as only one offense. While this may be one reason for concluding that subsection (5)(a)(ii) was not meant to be used in defining what prior offenses count as strikes, it also underscores the ambiguity of the statute on this point.

In sum, it is my view that it is not at all clear that the definition of "persistent offender" refers to only the washout provisions of RCW 9.94A.360(2). It is well established that a statute is ambiguous if it can be reasonably interpreted in two or more ways. *State v. Tili*, 139 Wn.2d 107, 115, 985 P.2d 365 (1999). In my view, Keller has presented a reasonable argument that his two prior convictions are subject to the provisions of RCW 9.94A .360(5)(a)(ii) and, therefore, "count" as only one in computing his offender score. Particularly in light of the fact that a life sentence without the possibility of parole is at stake here, we should be free of doubt about the meaning

of the statutes in question before we reject that argument. Because I am left with substantial doubt, I would resolve the ambiguity in favor of Keller per the rule of lenity.

/s/ Alexander, C.J.

/s/ Sanders, J.

/s/ Johnson J.

/s/ Madsen, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. LAWRENCE JOHN KELLER, Appellant.	)))))))	No. 40207-2-1 DIVISION ONE (Filed Dec. 13, 1999)

COX, J. – Lawrence Keller appeals his conviction and sentence for vehicular assault and felony hit and run. He contends that the trial court erroneously sentenced him to life imprisonment without the possibility of parole under the persistent offender accountability act (POAA).[1] Specifically, he claims that because his prior two convictions for "most serious offenses" were committed before July 1, 1986, and served concurrently, those offenses only count as one, not two, for the purposes of the POAA. We hold that Keller's two prior convictions count as two offenses for the purposes of the POAA. We also conclude that there was no other error and affirm.

Keller was involved in a car accident on October 16, 1994. The accident left the occupants of the other car seriously injured. Although Keller insisted he was the

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[1] The relevant portions of the POAA, as it existed in 1994, were codified at former RCW 9.94A.030(21) (definition of a "[m]ost serious offense"); former RCW 9.94A.030(25) (definition of a "[p]ersistent offender); and former RCW 9.94A.120(4) (stating, "A persistent offender shall be sentenced to a term of total confinement for life without the possibility of parole. . . . ").

passenger, not the driver, at the time of the accident, the State charged him with vehicular assault and felony hit and run. A jury convicted him on both counts. But the court vacated the jury verdict based on prosecutorial misconduct during closing arguments in the first trial.

Over Keller's double jeopardy objections, he was again tried and convicted of vehicular assault and felony hit and run. At sentencing, the court determined that Keller was a persistent offender and sentenced him to life in prison without the possibility of parole.

Keller appeals the judgment and sentence.

POAA

Keller served concurrent sentences for two prior convictions, one for aggravated assault and the other for second degree assault. He committed each crime on separate occasions and before July 1, 1986. Keller contends that because these two crimes "count" as only one offense in the calculation of his offender score, they also "count" as only one offense in determining whether he is a persistent offender. This argument is not supported by the governing statutes, and we reject it.

We review de novo the trial court's application of the relevant statutes to make sentencing determinations under the POAA.[2] When we construe a statute, we do so in the manner that best fulfills its legislative purpose and

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[2] *In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 245, 955 P.2d 798 (1998) (holding that the application of the Sentencing Reform Act of 1981 (SRA), including its sentencing provisions, is a question of law that is reviewed de novo).

intent.[3] Legislative intent is primarily determined from the statutory language.[4] Absent evidence of a contrary intent, we must give words in a statute their plain and ordinary meaning.[5] When the same words are used in related statutes, we must presume that the Legislature intended the words to have the same meaning.[6] Conversely, when different words are used in the same statute to deal with related matters, we must presume that the Legislature intended those words to have different meanings.[7] We avoid constructions that cause unlikely, strange, or absurd results.[8] We construe each part or section of a statute in connection with every other part to harmonize the statute as a whole.[9]

Keller's statutory argument involves three former provisions of the SRA. They are former RCW 9.94A.030(25), which defines a persistent offender under the POAA, and former RCW 9.94A.360(2) and (6), which set forth specific rules for determining a defendant's offender score under the SRA. The question before us is the extent to which the provisions related to offender

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[3] *State v. Villegas*, 72 Wn. App. 34, 37, 863 P.2d 560 (1993), *review denied*, 124 Wn.2d 1002 (1994).

[4] *State v. Young*, 125 Wn.2d 688, 694, 888 P.2d 142 (1995).

[5] *Koker v. Armstrong Cork, Inc.*, 60 Wn. App. 466, 471, 804 P.2d 659, *review denied*, 117 Wn.2d 1006 (1991).

[6] 2A Norma J. Singer, *Sutherland Statutory Construction* § 46.06, at 120 (5th ed. 1999) ("There is a presumption that the same words used twice in the act have the same meaning."); *State v. Akin*, 77 Wn. App. 575, 580-81, 892 P.2d 774 (1995).

[7] *State v. Jackson*, 65 Wn. App. 856, 860, 829 P.2d 1136 (1992).

[8] *State v. Contreras*, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994).

[9] *Akin*, 77 Wn. App. at 580.

scores apply to the definition of a persistent offender. For the following reasons, we conclude that former RCW 9.94A.360 applies only to exclude prior convictions that have "wash[ed] out"[10] under former RCW 9.94A.360(2) in determining whether a defendant is a persistent offender.

First, former RCW 9.94A.030(25) defines a "persistent offender" as one who:

> (a) Has been convicted in this state of any felony considered a most serious offense; and
>
> (b) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be *included in the offender score* under RCW 9.94A.360; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted.[11]

Our focus here is on the phrase *"included in the offender score"* of subsection (b), above, because the remaining portions of the statute are not at issue here.[12]

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[10] *See State v. Morley*, 134 Wn.2d 588, 601, 952 P.2d 167 (1998) (RCW 9.94A.360(2) sets forth when various classes of crimes in a defendant's history must be included in the offender score, the consideration under this subsection being whether the prior conviction is old enough to "wash out").

[11] (Italics ours.)

[12] Keller's current conviction for vehicular assault qualifies as a "most serious offense" under subsection (a), and the two

Exactly the same phrase is found in former RCW 9.94A.360, to which the persistent offender definition expressly refers. This statute sets forth the "offender score rules." Subsection (2), the "washout" provision,[13] states in part:

> Except as provided in subsection (4) of this section,[14] class A and sex prior felony convictions shall always be *included in the offender score.* Class B prior felony convictions other than sex offenses shall not be *included in the offender score,* if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without being convicted of any felonies. Class C prior felony convictions other than sex offenses shall not be *included in the offender score* if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment

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prior convictions satisfy the other requirements of subsection (b) because they were committed on separate occasions and one occurred before the other most serious offense was committed.

[13] *See, e.g., Villegas,* 72 Wn. App. at 38 (1993) (referring to RCW 9.94A.360(2) as the " 'washout' " provision).

[14] Subsection (4) of former RCW 9.94A.360 provided as follows:

"Always include juvenile convictions for sex offenses. Include other class A juvenile felonies only if the offender was 15 or older at the time the juvenile offense was committed. Include other class B and C juvenile felony convictions only if the offender was 15 or older at the time the juvenile offense was committed and the offender was less than 23 at the time the offense for which he or she is being sentenced was committed."

> and sentence, the offender had spent five consecutive years in the community without being convicted of any felonies.[15]

We presume that the Legislature intended that the phrase "included in the offender score" had the same meaning when used in these two closely related statutes, former RCW 9.94A.030(25) and former RCW 9.94A.360(2).[16] Consistent with this approach, we also presume that the phrase has the same meaning throughout former RCW 9.94A.360(2).

Second, the Legislature used different wording in former RCW 9.94A.360(6)(c), which provided:

> In the case of multiple prior convictions, for offenses committed before July 1, 1986, for the purpose of computing the offender score, *count all adult convictions served concurrently as one offense*. . . . Use the conviction for the offense that yields the highest offender score.[17]

Thus, in contrast to "included in the offender score" used in former RCW 9.94A.030(25) and former RCW 9.94A.360(2), the Legislature here instructs courts how to "count" multiple prior offenses in calculating the offender score. We presume that the Legislature intended different meanings by the use of different wording.[18]

Focusing on the word "count" in subsection (6)(c), Keller essentially argues that his two prior convictions,

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[15] (Italics ours.)

[16] *Akin*, 77 Wn. App. at 580-81.

[17] (Italics ours.)

[18] *Jackson*, 65 Wn. App. at 860.

for which he served concurrent sentences, "count" as one offense. He contends that those two prior convictions would "count" as one offense for the purpose of his offender score. Moreover, he maintains that "count" is interchangeable with "included" in the clause "included in the offender score" that is part of the definition of persistent offender. From this premise, he concludes his two prior most serious offenses "count" as only one offense under the POAA as well as under the offender score rules.

There are two problems with this approach. First, it relies too heavily on considering the words "count" and "include" in isolation. In properly construing the statute, it is far more important to consider these words in the context in which they are used in the statutes rather than to consider their meanings in isolation.[19]

The second problem is that Keller's argument violates a fundamental rule of construction that governs here: the phrases in these two closely related statutes are different and thus presumptively have different meanings. The additional dimension of this rule here is that the Legislature used different wording within the different subsections of former RCW 9.94A.360. Whereas the phrase "included in the offender score" appears in subsection (2), it does not appear in subsection (6)(c) or in any other subsections of former RCW 9.94A.360. This is significant because it reinforces our view that the Legislature meant different things when it wrote subsections (2)

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[19] 2A Singer, *supra* note 6 sec. 46.05, at 104 (quoting *Leach v. Federal Deposit Ins. Corp.*, 860 F.2d 1266 (5th Cir. 1988), *cert. denied*, 491 U.S. 905 (1989)).

and (6)(c) of former RCW 9.94A.360. Moreover, had the Legislature intended this phrase to mean what Keller argues, it would have been a simple task for the Legislature to use the same phrase in subsection (6)(c) as it did in subsection (2). The Legislature's choice not to do that supports our view that Keller's argument is incorrect.

We conclude that it is unlikely that the Legislature intended subsection (6)(c) to be a provision by which offenders could escape the effect of the POAA. According to Keller's reading of the statute, any offender who had served concurrent sentences for multiple crimes committed before July 1, 1986, would always be considered to have committed only one prior offense for purposes of the POAA. But nothing in the statute or in any legislative history suggests that multiple "most serious" offenses committed prior to July 1, 1986, were to be considered as one offense under the POAA.

Rather, we think it more likely that the Legislature intended the reference to "included in the offender score" in former RCW 9.94A.030(25) to be limited to the "wash-out" provisions that are described in more detail in former RCW 9.94A.360(2). Under these provisions, certain prior convictions such as those for class A and sex felonies, will always be included in calculating a defendant's offender score. Other prior convictions, such as non-sex offense class B and C felonies, will wash out so long as the defendant is not again convicted for a specified minimum period of time. By washing out, the prior convictions are not included in the calculation of the offender score at sentencing for subsequent convictions.

Applying the washout provisions to the POAA is consistent with that act's purpose of deterring repeat offenses.[20] Because the "washout" provisions provide an incentive to not reoffend, they advance the goals of the POAA.

Keller also argues that the different definitions of "criminal history"[21] and "offender score"[22] demonstrate that RCW 9.94A.360(6)(c) precludes consideration of his two prior convictions for purposes of the POAA. He notes that "criminal history," which includes *all* of a defendant's prior convictions, is broader than "offender score," which may include only certain prior convictions because of the way in which that score is calculated. According to Keller, if we consider his two prior convictions for crimes committed before July 1, 1986, we would essentially rewrite the definition of persistent offender to include an offender's entire criminal history, not just those convictions that would be "included in the offender score under RCW 9.94A.360." We do not agree.

As we discussed above, we read the definition of persistent offender to incorporate only the washout provisions of RCW 9.94A.360(2). Thus, a defendant's entire criminal history would not be used to determine whether

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[20] *State v. Thorne*, 129 Wn.2d 736, 771, 921 P.2d 514 (1996).

[21] Former RCW 9.94A.030(12)(a) provides in part: " 'Criminal history' " means the list of a defendant's prior convictions, whether in this state, in federal court, or elsewhere."

[22] RCW 9.94A.360 states in part: "The offender score is the sum of points accrued under this section rounded down to the nearest whole number."

he or she is a persistent offender. Rather, only those convictions that have not washed out and are therefore "included in the offender score" under former RCW 9.94A.360 are considered for purposes of the POAA.

Keller next argues that the use of "count" and "include" in court decisions prove that the words are interchangeable. But because the cases on which Keller relies use "count" and "include" in different contexts than the one before us, Keller's reliance on them is misplaced.

Keller cites passages from *Morley*,[23] *State v. Luckett*,[24] and *In re Personal Restraint of Holmes*[25] to demonstrate that "count" and "include" are synonymous under the SRA. But these cases involved a general challenge to the defendant's offender score. In *Morley*, our Supreme Court determined that courts-martial can be "included" in a defendant's offender score. And in *Luckett* and *Holmes*, this court reviewed the calculation of Luckett's and Holmes' offender scores. In each of these cases, "count" and "include" are used interchangeably to mean "consider" or "tally." Clearly, that usage in court decisions does not answer the question we face here whether the Legislature intended "included within the offender score" in former RCW 9.94A.030(25) and former RCW 9.94A.360(2) to carry the same meaning as "count" in former RCW 9.94A.360(6)(c).

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[23] 134 Wn.2d 588.

[24] 73 Wn. App. 182, 186, 869 P.2d 75, *review denied*, 124 Wn.2d 1015 (1994).

[25] 69 Wn. App. 282, 848 P.2d 754 (1993).

Keller also urges us to apply the rule of lenity here by construing the phrase "included in the offender score" in the fashion that he proposes. Because we conclude that former RCW 9.94A.030(25) is not ambiguous, we decline to apply the rule of lenity.[26]

To summarize, the phrase "included in the offender score under [former] RCW 9.94A.360" as used in former RCW 9.94A.030(25) refers specifically to the washout provisions set forth in former RCW 9.94A.360(2). The phrase is not interchangeable with the provisions of former RCW 9.94A.360(6)(c). Here, Keller's two prior most serious offenses are both included because there is no basis for concluding that either offense qualifies for different treatment. He is a persistent offender under the definition of the POAA.

We affirm the judgment and sentence.

The remainder of this opinion has no precedential value and will be filed for public record in accordance with the rules governing unpublished opinions.[27]

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[26] *See In re Personal Restraint of Sietz*, 124 Wn.2d 645, 652, 880 P.2d 34 (1994) (rule of lenity applies only where statute is ambiguous and not clarified by legislative history); *see also Moskal v. United States*, 498 U.S. 103, 107-08, 111 S. Ct. 461, 112 L. Ed. 2d 449 (1990) (reserving application of the rule of lenity to those situations in which a reasonable doubt persists about a statute's intended scope after resort to rules of construction).

[27] 27 RCW 2.06.040.

Ex Post Facto/Due Process

Keller argues that the trial court violated his right to be free of ex post facto legislation by applying RCW 9.94A.360(6)(b)(iii), the 1996 version of the statute, to determine his status as a persistent offender in 1994. But because we have already determined in this opinion that the trial court's alternative basis for the sentencing was proper, we need not address further the ex post facto issues that Keller raises.[28]

Equal Protection

Keller argues that a retroactive application of RCW 9.94A.360(6)(b)(iii), the 1996 version of the statute, impermissibly creates two classes of offenders. Because we have concluded that the court's alternative basis for sentencing was correct, we need not consider this argument.

Double Jeopardy

Keller argues that the State violated the constitutional prohibitions against double jeopardy when it reprosecuted him after the court vacated the earlier convictions based on prosecutorial misconduct. We do not agree.

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[28] Keller's ex post facto argument may more appropriately be characterized as a due process challenge. In *State v. Aho*, 137 Wn.2d 736, 742, 975 P.2d 512 (1999), our Supreme Court held that the retroactive application of a statute violated due process, not ex post facto prohibitions, because the new statute did not "alter the definition of criminal conduct or increase the punishment for a crime."

The double jeopardy provisions in the federal and state constitutions protect criminal defendants from repeated prosecutions for the same offense.[29] Generally, when the defendant moves for a mistrial, the double jeopardy clause does not bar retrial.[30] But, under the federal standard, double jeopardy will bar retrial when the prosecutor acts to "goad" the defendant into requesting a mistrial.[31] And, under a separate standard developed by Oregon courts, double jeopardy will bar retrial when "improper official conduct is so prejudicial to the defendant that it cannot be cured by means short of a mistrial, and if the official knows that the conduct is improper and prejudicial and either intends or is indifferent to the resulting mistrial or reversal."[32]

Our Supreme Court has deferred defining the scope of Washington's double jeopardy clause or deciding between the federal and Oregon tests because it has not yet heard a case where the analysis under the two tests would lead to different results.[33] Keller urges us to adopt

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[29] U.S. Const. amend. 5; Const., art. I, sec. 9 states, "No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense."

[30] *Oregon v. Kennedy*, 456 U.S 667, 672-73, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982) (citing *United States v. Tateo*, 377 U.S. 463, 467; 84 S. Ct. 1587, 12 L. Ed. 2d 448 (1964)).

[31] *Kennedy*, 456 U.S. at 673 (citing *United States v. Dinitz*, 424 U.S. 600, 611, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976)).

[32] *State v. Kennedy*, 295 Or. 260, 276, 666 P.2d 1316, 1326 (1983).

[33] *State v. Hopson*, 113 Wn.2d 273, 283-84, 778 P.2d 1014 (1989).

the broader Oregon standard. In the alternative, he asserts that the facts of this case would also bar retrial under the federal standard. Because the prosecutorial misconduct does not bar retrial under either the Oregon or the federal standard, we need not decide the scope of Washington's constitutional provisions.[34]

We review prosecutorial misconduct rulings for an abuse of discretion.[35] The misconduct at issue in this case occurred during the prosecutor's closing argument when she repeatedly mischaracterized the testimony of William Morgan, one of the State's witnesses. Morgan testified that when Keller was told he had been in a serious car accident, he said, "I am not going to jail. I am not going back. I am not going to stay. I am going to leave." In contrast to this testimony, the prosecutor argued that Keller had said, "I am not going *back to jail*.[36] I am out of here."

Defense counsel objected and moved for a mistrial, arguing that the prosecutor misrepresented Morgan's testimony and that she violated a pretrial ruling barring ER 404(b) evidence. Although the court denied the motion for a mistrial, the prosecutor was admonished not to "make any further references about not going back to jail

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[34] *See State v. Lewis*, 78 Wn. App. 739, 898 P.2d 874 (1995) (although the court analyzed Lewis's double jeopardy claim under both the federal and the Oregon standard, it did not decide between the two tests because Lewis did not meet either one of them), *review denied*, 128 Wn.2d 1012 (1996).

[35] *State v. Brett*, 126 Wn.2d 136, 174-75, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996).

[36] (Italics ours.)

in this case." The court also gave a curative instruction to the jury.[37]

Despite this ruling, the prosecutor, during her rebuttal, repeated the statement that Keller was not going "back to jail":

> He is guilty of the hit-and-run because he did not stay at the scene. He said, "I am not going back to jail. I am not going back. I am not going to jail." He said, "I am not going to jail. I am not going back. I'm going to leave. I'm not going to stay.

The defense again moved for a mistrial, which the trial court granted despite the prosecutor's inexplicable assertion that her misconduct had not been deliberate.

On retrial, Keller moved to dismiss the charges on double jeopardy grounds. Denying the motion, the court specifically found that the prosecutor's misconduct had not been intended to "goad" Keller into requesting a mistrial and was thus insufficient to bar a retrial. According to the court, neither the evidence presented in the trial nor the course of the proceedings supported a finding that the prosecutor acted with an intention to "goad" the defendant to move for a mistrial. We agree with the trial court that Keller did not meet the federal double jeopardy standard.[38]

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[37] "I have already instructed you that the argument of counsel is not evidence. Disregard any alleged statement that the defendant made any reference to jail."

[38] *Lewis*, 78 Wn. App. at 742.

Likewise, Keller has not satisfied the Oregon standard.[39] Under that test, the prosecutor must have knowingly engaged in prejudicial misconduct. There must be some showing that the misconduct was flagrant and irremediable.[40] The trial court specificaily found that the misconduct was not flagrant, and it cannot be inferred from the facts on the record that the prosecutor was indifferent to the result of forcing a mistrial.

Under either standard, Keller's retrial was not barred by the constitutional prohibition against double jeopardy.

POAA Challenges

Cruel Punishment

Keller argues that his sentence under the POAA violates constitutional prohibitions against cruel punishments. It does not.

The eighth amendment to the United States Constitution specifies that "cruel and unusual punishments [shall not be] inflicted." In a similar provision, our state constitution prohibits "cruel punishment."[41] The Washington Constitution is more protective than its federal counterpart, so we analyze the issue under our state constitutional provision.[42]

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[39] *Lewis*, 78 Wn. App. at 742-743.

[40] *Lewis*, 78 Wn. App. at 743 (quoting *Kennedy*, 295 Or. at 276).

[41] Const., art. I, sec. 14.

[42] *State v. Fain*, 94 Wn.2d 387, 392-93, 617 P.2d 720 (1980).

Our state's proscription against cruel punishment requires proportionality between the punishment and the crime.[43] To determine whether a sentence imposed under a recidivist statute comports with Washington's proscription against cruel punishment, courts must evaluate (1) the nature of the offense, (2) the legislative purpose of the habitual criminal statute, (3) the punishment the defendant would have received in other jurisdictions for the same offense, and (4) the punishment the defendant would have received for other offenses in Washington.[44]

Applying these factors to Keller's case leads to the conclusion that his sentence is not disproportionate in violation of our state constitution. First, the nature of his offenses does not differ from the offenses at issue in the cases in which our Supreme Court rejected this challenge.[45] Keller was convicted of assault in the second degree and aggravated assault. Both of these crimes involve violence or the potential for violence against a person.

Keller's third offense was vehicular assault. Unlike the other crimes considered to be "most serious

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[43] *Fain*, 94 Wn.2d at 402.

[44] *Fain*, 94 Wn.2d at 397.

[45] *State v. Manussier*, 129 Wn.2d 652, 674-79, 921 P.2d 473 (1996), *cert. denied*, 520 U.S. 1201 (1997); *State v. Rivers*, 129 Wn.2d 697, 712-15, 921 P.2d 495 (1996); *Thorne*, 129 Wn.2d at 772-76; *State v. Cruz*, 91 Wn. App. 389, 402-03, 959 P.2d 670 (1998), *reversed on other grounds*, 139 Wn.2d 186, 985 P.2d 384 (1999); *State v. Ames*, 89 Wn. App. 702, 709-10, 950 P.2d 514, *review denied*, 136 Wn.2d 1009 (1998).

offense[s]" under the POAA,[46] vehicular assault requires no intent. Rather, "[a] person is guilty of vehicular assault" when he or she drives recklessly or under the influence of alcohol or drugs and proximately causes "serious bodily injury to another."[47] Serious bodily injury involves "a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body."[48] The severity of the injury to another person, in conjunction with the culpable conduct of driving recklessly or under the influence of drugs or alcohol, makes vehicular assault not only a "most serious offense" under the POAA,[49] but also a "violent offense" under Washington's criminal code.[50]

Keller also fails to establish that the second *Fain* factor, the legislative purpose of the recidivist statute, weighs in his favor. The purpose of the POAA is "to improve public safety by placing the most dangerous criminals in prison [and to] reduce the number of serious, repeat offenders by tougher sentencing."[51] Moreover, our Supreme Court has stated that it must "defer to the legislative decision to impose an enhanced penalty on recidivists,"[52] and it has specifically upheld the POAA

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[46] RCW 9.94A.030 (23).

[47] RCW 46.61.522(1)(a), (b).

[48] RCW 46.61.522(2).

[49] RCW 9.94A.030(23)(a).

[50] RCW 9.94A.030(38)(a).

[51] *Thorne*, 129 Wn.2d at 771.

[52] *Fain*, 94 Wn.2d at 402.

against constitutional challenges under the proscription against cruel punishment.[53]

The third *Fain* factor requires us to consider the punishment that Keller would have received in other jurisdictions for these same offenses. As our Supreme Court stated in *Thorne*, "Washington's so-called 'three strikes' law is similar to state and federal legislation throughout much of the United States."[54] Because many of those recidivist statutes impose life sentences for a defendant's third serious offense, this factor does not weigh in Keller's favor. Similarly, the final *Fain* factor, what punishment Keller would receive in this jurisdiction for other offenses, is of little help to Keller. Under the POAA, "all defendants who are convicted of a third 'most serious offense' receive sentences of life imprisonment without possibility of parole."[55]

In short, Keller fails to demonstrate how the POAA sentence, when applied to him, amounts to cruel punishment under our state constitution. Likewise, he fails to show it is disproportionate under the state constitution.

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[53] *Manussier*, 129 Wn.2d at 674-79; *Rivers*, 129 Wn.2d at 712-15; *Thorne*, 129 Wn.2d at 772-76.

[54] *Thorne*, 129 Wn.2d at 775.

[55] *Thorne*, 129 Wn.2d at 775.

Ex Post Facto

Keller claims that the POAA violates the ex post facto clause of the federal constitution[56] by making the punishment for his prior convictions more severe than it was when the offenses were committed.

In *State v. Angehrn*,[57] we rejected an ex post facto challenge to the POAA. We noted that the "POAA's mandatory sentence of life without parole is triggered only upon the conviction of the third " 'most serious offense.' "[58] Thus, it does not retroactively increase the punishment for prior offenses.[59] Moreover, where, as here, the third most serious offense is committed after the enactment of POAA, a defendant has fair notice that conviction of that offense is punishable by life without the possibility of parole.

For the above reasons, we conclude there was no ex post facto violation here.

Other Constitutional Challenges

Because our Supreme Court has rejected Keller's remaining constitutional challenges to the POAA,[60] we will mention them here only briefly.

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[56] U.S. Const. art 1, sec. 10.

[57] 90 Wn. App. 339, 342-44, 952 P.2d 195, *review denied*, 136 Wn.2d 1017 (1998), *cert. denied*, 120 S. Ct. 92 (1999).

[58] *Angehrn*, 90 Wn. App. at 343 (citing RCW 9.94A.030(23), (27), 120(4)).

[59] *Angehrn*, 90 Wn. App. at 343.

[60] *Manussier*, 129 Wn.2d 652; *Rivers*, 129 Wn.2d 697; *Thorne*, 129 Wn.2d 736.

Our Supreme Court has concluded that the POAA does not violate constitutional guaranties of a republican form of government;[61] does not violate a defendant's procedural due process rights;[62] is not a bill of attainder;[63] and does not violate due process by requiring only proof by a preponderance of the evidence rather than beyond a reasonable doubt that the defendant is a persistent offender under the POAA.[64]

Pro Se Issues

Keller raises a number of challenges in his pro se brief on appeal. We note at the outset that our task in responding to these issues is made more difficult in this particular case by the absence of briefing by the State in response to the pro se brief. In any event, we have thoroughly reviewed the record and considered Keller's arguments in reaching our decision.

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[61] *State v. Davis*, 133 Wn.2d 187, 190, 943 P.2d 283 (1997) (concluding that "any challenge to the Three Strikes Law based on the 'Guarantee Clause' would be frivolous").

[62] *Manussier*, 129 Wn.2d at 682-83; *Thorne*, 129 Wn.2d at 776-79.

[63] *Manussier*, 129 Wn.2d at 665-67; *Thorne*, 129 Wn.2d at 758-60.

[64] *Thorne*, 129 Wn.2d at 783-84 (citing *State v. Ammons*, 105 Wn.2d 175, 185-86, 713 P.2d 719, 718 P.2d 796, *cert. denied*, 479 U.S. 930 (1986)).

A. Recess/Continuance

Keller argues that the trial court erred by granting the State's motion for a six-week recess during trial. We do not agree.

We review a grant of continuance for abuse of discretion.[65] Here, the prosecutor requested a continuance to conduct DNA testing for a newly discovered defense witness. That witness, Michael Cleary, testified during an immunity hearing that he was the driver of Keller's car when the accident occurred. To confirm or deny the truth of this testimony, the State needed to test the trace evidence it collected from the dashboard of the car following the accident. The trial court granted the recess and specifically stated its reasons for doing so.

First, the court noted that Cleary was not made known to the court at any time during Keller's first trial. Second, Keller advised the court and the prosecutor only one day before calling Cleary to the stand that Cleary would testify. Moreover, Cleary testified that while he and Keller were incarcerated together, Keller had asked Cleary to testify on his behalf. The court noted that even if Cleary were unknown to defense counsel, he was known to the defendant and "could have been made available more than one day before we were anticipating closing this trial."[66] Finally, because Cleary was a new and material witness whose testimony went to the heart of the case, fairness required that the State have the

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[65] *State v. Picard*, 90 Wn. App. 890, 898, 954 P.2d 336, *review denied*, 136 Wn.2d 1021 (1998).

[66] Report of Proceedings at 2372.

opportunity to do the genetic testing to determine Cleary's credibility.

Thus, the trial court's decision to grant the recess had a tenable basis and does not constitute an abuse of discretion.

Keller argues that when faced with the prospect of a recess, he offered to "forego calling Cleary in order to finish the trial in a timely manner."[67] He claims that the trial court refused this request. But Keller fails to cite to the portion of the record reflecting this exchange with the court, and we have not found it in our review of the record. On this record, we cannot further review this argument.

B. Most Serious Offense

Keller argues that the trial court erred in counting a prior out-of-state conviction as a "most serious offense" under Washington's POAA. He is mistaken.

To establish a defendant's criminal history for sentencing purposes, the State must prove the existence of prior convictions by a preponderance of the evidence.[68] In the case of an out-of-state conviction, the offense is classified according to the comparable offense under Washington law.[69] In finding the comparable Washington offense, the court compares the elements of the out-of-

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[67] Pro Se Brief of Appellant at 8.

[68] *State v. McCorkle*, 88 Wn. App. 485, 492, 945 P.2d 736 (1997), *aff'd*, 137 Wn.2d 490, 973 P.2d 461 (1999).

[69] *McCorkle*, 88 Wn. App. at 493 (citing RCW 9.94A.360(3)).

state offense with the elements of "potentially comparable Washington offenses."[70] We review the trial court's determination, which involves the application of relevant statutes to sentencing under the POAA, de novo.[71]

Here, the trial court found that Keller's Arizona conviction for aggravated assault in the third degree is a "most serious offense" under the POAA. That determination is supported by the record. The presentence investigation report states in part:

> On March 1, 1982 the defendant forced the victim . . . *at gunpoint* to release the defendant's dog from the holding area of a county rabies animal control vehicle. . . . After the victim had placed the dog in the rear of the county vehicle, he was making out his paperwork. As he was doing this the defendant approached *pointing a shotgun at the victim* stating that he wanted his dog back. The victim complied.[72]

Moreover, the defendant's statement contained in this same report states:

> The defendant's statement of the facts of this case substantially agrees with that as given by the DPS [Department of Public Safety] officer. . . . The defendant states that he took the DPS car, lost the officers in the chase, and then returned to the scene in order to rescue the dog.

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[70] *McCorkle*, 88 Wn. App. at 495 (citing *State v. Weiand*, 66 Wn. App. 29, 31-34, 831 P.2d 749 (1992)).

[71] *Charles*, 135 Wn.2d at 245.

[72] Clerk's Papers at 485 (italics ours).

> It was at this time that he obtained his dog by *using the shotgun* against victim Snyder.[73]

And the indictment, also before the trial court, states:

> LAWRENCE JOHN KELLER, on or about the 1st day of MARCH, 1982, using a deadly weapon or dangerous instrument, to-wit: a shotgun, intentionally placed [the victim] in reasonable apprehension of imminent physical injury, in violation of A.R.S. §§ 13-1204(A)(2), (B), 13-1203(A)(2), 13-701, 13-702 and 13-801.[74]

The record establishes a deadly weapon finding in Keller's Arizona conviction for third degree aggravated assault. Thus, that out-of-state conviction is comparable to one of the "most serious offenses" under the POAA.

C. Equal Protection

Keller argues that categorizing vehicular assault as a "most serious offense" under the POAA violates constitutional guaranties of equal protection under the laws. We disagree.

Under the equal protection clause of the Washington State Constitution, article 1, section 12, and the fourteenth amendment to the federal constitution, persons who are similarly situated with respect to the legitimate purpose of the law must receive like treatment.[75] We review a statutory classification that implicates a physical liberty

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[73] Clerk's Papers at 486 (italics ours).

[74] Clerk's Papers at 462 (italics ours).

[75] *In re Personal Restraint of Young*, 122 Wn.2d 1, 44, 857 P.2d 989 (1993); *State v. Coria*, 120 Wn.2d 156, 169, 839 P.2d 890 (1992).

interest under the rational basis test.[76] "Under this test, a legislative classification will be upheld unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives."[77] The party challenging the classification bears the burden of proving that it is purely arbitrary.[78]

As our Supreme Court has held, the purpose of the POAA is "to improve public safety by placing the most dangerous criminals in prison [and to] reduce the number of serious, repeat offenders by tougher sentencing."[79] The rational basis test requires only that the law's means be rationally related to its ends. Categorizing vehicular assault as a "most serious offense"[80] is rationally related to the goal of placing the most dangerous criminals in prison.

Vehicular assault, a class B felony, involves either reckless driving or driving under the influence of alcohol or drugs, which causes serious bodily injury to another.[81] Given that serious bodily injury is an element of vehicular assault, it is reasonable that the Legislature included it as a "most serious offense." Moreover, that the Legislature decided to classify this crime as a class B felony

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[76] *Thorne*, 129 Wn.2d at 771 (explaining that a statutory classification that implicates a physical liberty interest and a semisuspect class is "subject to the intermediate level of scrutiny under the equal protection clause").

[77] *Thorne*, 129 Wn.2d at 771.

[78] *Thorne*, 129 Wn.2d at 771.

[79] *Thorne*, 129 Wn.2d at 771.

[80] RCW 9.94A.030(23)(q).

[81] RCW 46.61.522(1).

further demonstrates its intention to treat the crime as one of Washington's most serious offenses. Clearly, vehicular assault is not a mere car accident as Keller argues. Including it among the most serious offenses for purposes of the POAA is rationally related to the purpose of the act and does not violate constitutional guaranties of equal protection.

Keller also argues that the Supreme Court has construed the most serious offenses under the POAA as including only class A and B felonies. He argues that at the time of his accident, vehicular assault was a class C felony[82] and therefore should not have been categorized by the trial court as a most serious offense. We reject this argument.

First, Keller misapprehends the holding of *Manussier*. He argues that because our Supreme Court discussed only class A and B felonies in conjunction with the POAA,[83] the court necessarily concluded that the act was meant to include only those categories of crimes as most serious offenses. But when reading the entire opinion, it is clear that additional categories of crimes are included as most serious offenses:

> A "most serious offense" includes the following: (a) any Class A felony; (b) any Class B felony with a finding of "sexual motivation" as defined by statute; (c) any felony with a deadly

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[82] Former RCW 46.61.522(3) classified vehicular assault as a class C felony.

[83] *Manussier*, 129 Wn.2d at 664.

> weapon finding; and (d) seventeen other named offenses.[84]

Among those "seventeen other named offenses" is vehicular assault.[85]

Second, although vehicular assault was categorized as a class C felony in 1994 when the car accident occurred, it was still listed as a "most serious offense."[86]

D. Admission of Keller's Statement

Keller argues that the trial court erred in admitting a statement he made while hospitalized because he had not been read his *Miranda*[87] rights.

We review a trial court's CrR 3.5 findings of fact to determine whether the record supports them.[88] We review conclusions of law de novo.[89]

Because the trial court found that Keller was in custody for the purposes of *Miranda*, Keller challenges only

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[84] *Manussier*, 129 Wn.2d at 659 (citing former RCW 9.94A.030(21)(a)-(u) for the "seventeen other named offenses").

[85] Former RCW 9.94A.030(21)(q).

[86] Former RCW 9.94A.030(21)(q).

[87] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).

[88] *State v. Nelson*, 74 Wn. App. 380, 393, 874 P.2d 170, *review denied*, 125 Wn.2d 1002 (1994).

[89] *Dempere v. Nelson*, 76 Wn. App. 403, 406, 886 P.2d 219 (1994), *review denied*, 126 Wn.2d 1015 (1995).

the trial court's finding that he was not being interrogated and its conclusion that his statement was "unsolicited and voluntary."[90] We reject these challenges.

A custodial interrogation is defined as " 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' "[91] Questioning that constitutes interrogation is any express question or any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the defendant.[92]

Here, the trial court found that Seattle Police Officer Christopher Myers spoke to Keller while Keller was being treated at Harborview Medical Center following the accident. After Keller acknowledged his identity, Officer Myers told him he was under arrest for vehicular assault and that he would have blood drawn. Officer Myers testified at trial that the following exchange took place:

> [Keller]: Assault who? . . .
>
> [Officer Myers]: The people in the car you hit. . . .
>
> [Keller]: Oh. Okay. Go ahead, then.[93]

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[90] Report of Proceedings at 32.

[91] *State v. Burt*, 24 Wn. App. 867, 871, 605 P.2d 342 (1979) (quoting *Miranda*, 384 U.S. at 444).

[92] *State v. Sargent*, 111 Wn.2d 641, 650, 762 P.2d 1127 (1988).

[93] Report of Proceedings 1755.

Officer Myers testified that he then advised Keller of his *Miranda* rights as well as other warnings regarding the drawing of blood.[94]

Substantial evidence supports the trial court's finding that Keller was not interrogated. From these facts, we conclude that Keller's statement was voluntary and unsolicited. Officer Myers did not do or say anything that would be likely to elicit an incriminating response. He simply told Keller that he was under arrest for vehicular assault and informed him he would have some blood drawn. Keller asked Officer Myers about the assault charge and when informed that it related to the people in the car Keller hit, Keller acquiesced to the drawing of blood. The trial court did not err in admitting Keller's statement to Officer Myers.

E. Prosecutorial Misconduct

Keller argues that prosecutorial misconduct during closing argument deprived him of a fair trial and warrants reversal. We do not agree.

We review a trial court's rulings regarding prosecutorial misconduct for abuse of discretion.[95] Absent an objection, we will review prosecutorial misconduct only if it is so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct.[96] Keller bears the burden of

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[94] Report of Proceedings 1755-56.

[95] *Brett*, 126 Wn.2d at 174-75.

[96] *State v. Belgardes*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

establishing the impropriety and prejudicial impact when considering the entire context of the record and circumstances at trial.[97]

During closing argument, the prosecutor summarized testimony presented at trial. In several instances, without objection, the facts as recited by the prosecutor differ from the actual testimony of various witnesses. In essence, the prosecutor mischaracterized the testimony of two eyewitnesses and misquoted another. But none of the statements rise to the level of being either so flagrant or so ill-intentioned that no curative instruction would have cured the mischaracterizations. At the hearing on the motion for mistrial, the court denied the motion on the basis that the jury was instructed to disregard any argument not supported by evidence.[98] Jurors are presumed to understand and follow the court's instructions.[99] Thus, assuming without deciding that there was misconduct here, there is no showing of prejudice requiring reversal.

F. Facial Validity of Prior Plea Agreements

Keller challenges the facial validity of the two prior pleas underlying the convictions that the court counted

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[97] *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

[98] The instruction stated: "The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court."

[99] *State v. Sanders*, 66 Wn. App. 380, 390-91, 832 P.2d 1326 (1992).

as "most serious offenses" under the POAA. We find the pleas were constitutionally valid.

To be valid, a plea must be made voluntarily and intelligently, with knowledge that certain constitutional rights will be waived.[100] The validity of a plea is determined from the totality of the circumstances.[101]

Keller pleaded guilty in 1979 to second degree assault in Washington and in 1982 to third degree aggravated assault in Arizona. He claims the pleas are facially invalid because they did not list the elements of the crime to which he pleaded guilty. He also contends that the State has not met its burden to prove that he made the pleas voluntarily.

The record indicates that the pleas are constitutionally valid. First, the pleas from Washington and Arizona clearly specify the crimes to which Keller pleaded guilty. Keller has neither cited appropriate legal authority nor provided us with a compelling reason why the absence of a list of the elements that constitute the crime renders the pleas invalid. Second, in the Arizona plea, Keller initialed each paragraph setting out the terms of the plea. One of these paragraphs states in part:

> I have read and understand the provisions of pages one and two of this agreement. I have discussed the case and my constitutional rights with my lawyer. I understand that by pleading guilty I will be waiving and giving up my right to a determination of probable cause, to a trial

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[100] *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996).

[101] *Branch*, 129 Wn.2d at 642.

> by jury, to confront, cross-examine, compel the attendance of witnesses, to present evidence in my behalf, my right to remain silent, my privilege against self-incrimination and presumption of innocence.[102]

Moreover, the Washington plea was voluntarily and intelligently made, as is evidenced by the transcript from the 1979 hearing during which Keller pleaded guilty to second degree assault. There, Keller's counsel stated to the court:

> I have discussed this matter on many occasions and specifically just before coming before your Honor. Upon entering the plea he is fully aware of all of the rights which he foregoes upon entering his plea, what the [sentencing] recommendation is, and all of the ramifications of entering a plea, and is prepared to enter a plea at this time.[103]

The court then questioned Keller directly:

> THE COURT: You have read the statement of defendant on plea of guilty and heard the statement of your counsel, Mr. Shorett. Do you agree with it in all respects?
>
> MR. KELLER: Yes, I do.
>
> THE COURT: Mr. Shorett has carefully gone over with you, has he not, the rights that you would be giving up as enumerated in paragraph five if you were to enter your plea?
>
> MR. KELLER: Yes.

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102 Clerk's Papers at 728.

103 Clerk's Papers at 679.

> THE COURT: You understand that you will be giving up those rights?
>
> MR. KELLER: Yes, I do.
>
> THE COURT: Is there any question in your mind or anything you need me to explain further that hasn't already been done by Mr. Shorett?
>
> MR. KELLER: No.
>
> THE COURT: Is there anything at all in that statement which you do not understand or you have any question about?
>
> MR. KELLER: No, there isn't.[104]

This colloquy demonstrates that Keller entered the plea voluntarily and intelligently. Thus, this plea, like the 1979 Arizona plea, is constitutionally valid and properly formed the basis for determining Keller's status as a persistent offender.

G. Jury Instruction

Keller argues that the court erred in giving its "to convict" instruction for felony hit and run. We hold that the instruction was proper.

When the trial court gives a jury instruction based upon a rule of law, as it is here, we review it de novo.[105]

Keller challenges the instruction regarding the felony hit and run charge. Instruction 13, the "to convict"

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[104] Clerk's Papers at 679-80.

[105] *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998).

instruction, informed the jury of the elements of hit and run. One of those elements is that the "defendant failed to satisfy his obligations to fulfill all of the following duties."[106] Among those enumerated duties is the obligation to give his name, address, insurance company, insurance liability policy number, and other relevant information to "any person struck or injured or the driver or any occupant of, or any person attending, any vehicle collided with."[107] Instruction 14 further explained these obligations:

> The obligation of a driver to give his name, address, insurance company, insurance liability policy number and vehicle license number and exhibit his driver's license to any person struck or injured or the driver or any occupant of, or any person attending, any vehicle collided with does not apply if none of these persons are in a condition to receive this information and no police officer is present. In this situation, the driver has an obligation to immediately report the accident to the nearest office of the duly authorized police authority and give the required information, after fulfilling all other obligations insofar as possible on his part to be performed.[108]

Keller contends that this instruction fails to inform the jury that the above-described obligations also do not apply if the defendant is not in a condition to be able to fulfill them because of injury or intoxication. But, the

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[106] Clerk's Papers at 399.

[107] Clerk's Papers at 399.

[108] Clerk's Papers at 401.

final clause of the instruction, "insofar as possible on his part to be performed," captures that meaning. It encompasses a situation where it is not possible, for whatever reason, for the defendant to fulfill his obligations under the law.

Because this instruction correctly states the law, the court did not err in so instructing the jury.

H. Juror Misconduct

Keller assigns error to the trial court's refusal to hold an evidentiary hearing regarding alleged juror misconduct. But because he fails to argue this assignment of error, we conclude he has abandoned the argument and will not consider it further.[109]

We affirm the judgment and sentence.

/s/ Cox, J.

WE CONCUR:

/s/ Baker, J

/s/ Becker, J.

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[109] RAP 10.3(a)(5); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

APPENDIX C

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. LAWRENCE JOHN KELLER, Defendant.	NO. 94-1-08323-2 **JUDGMENT AND SENTENCE** (Filed Feb. 18, 1997)

I. HEARING

1.1 The defendant, the defendant's lawyers and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: _____

1.2 The state has moved for dismissal of count(s) ___

II. FINDINGS

Based on the testimony heard, statements by defendant and/or victims, argument of counsel, the presentence report(s) and case record to date, and there being no reason why judgment should not be pronounced, the court finds:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on January 8, 1997 by JURY TRIAL of:

Count No.: I Crime: VEHICULAR ASSAULT

RCW 46.61.522(1)(b) Crime Code _____

Date of Crime 10/16/94 Incident No. _____

Count No.: II Crime: HIT AND RUN (FELONY)

RCW 46.52.020 Crime Code _____

Date of Crime 10/16/94 Incident No. _____

Count No.: ___ Crime: _____

RCW _____ Crime Code _____

Date of Crime _____ Incident No. _____

SPECIAL VERDICT/FINDINGS ON PERSISTENT OFFENDER:

Based on a sentencing hearing conducted today, the court finds the defendant is a Persistent Offender, and the court makes these special findings in accordance with RCW 9.94A.030(21), (25), and RCW 9.94A.120(4) as reenacted and amended by Initiative 593: that Court I is a most serious offense and that the defendant previously has been convicted on at least two separate occasions of most serious offense felonies, at least one of which occurred before the commission of the other most serious offense for which the defendant was previously convicted. Those prior convictions are listed in Section 2.3(a) – (b) of this Judgment and Sentence and each prior conviction would be included in the defendant's offender score.

OTHER CURRENT CONVICTION(S): Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____

(Current offenses not listed here are not encompassed)

2.3 **CRIMINAL HISTORY:** Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):

Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
(a) AGG. ASSAULT	3/9/83	A	CR5982	Maricopa Co., AZ
(b) ASSAULT 2	7/25/79	A	88220	King Co.

[ ] Additional felony criminal history

[ ] One point added for offense(s) committed while under community placement for count(s) _____

2.4 **SENTENCING DATA:**

	OFFENDER SCORE	SERIOUSNESS LEVEL	RANGE	MAXIMUM TERM
Count I:	LIFE WITHOUT EARLY RELEASE			
Count II:	9	IV	60 mos.	60 mos. (*stat max*)

[ ] Additional current offense sentencing data is attached in **Appendix C.**

2.4 **EXCEPTIONAL SENTENCE:**

[ ] Substantial and compelling reasons exist which justify a sentence above/below the standard range for Count(s) _____

Findings of fact and conclusion(s) are attached in **Appendix D.**

III. JUDGEMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and Appendix A.

[ ] The Court DISMISSES Count(s) _____

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 **RESTITUTION AND VICTIM ASSESSMENT:**

[ ] Defendant shall pay restitution to the Clerk of this Court as set forth in attached **Appendix E.**

[ ] Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.142(2), sets forth those circumstances in attached **Appendix E.**

[X] Restitution to be determined at future hearing on (Date) 5/20/97 at 8:30 .m. [ ] Date to be set.

[ ] Defendant waives presence at future restitution hearings(s).

Defendant shall pay $100 Victim Assessment, pursuant to RCW 7.68.035.

4.2 **OTHER FINANCIAL OBLIGATIONS:** Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

* * *

4.3 **PAYMENT SCHEDULE:** Defendant's **TOTAL FINANCIAL OBLIGATION** is: $100 Excluding restitution. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms:

[ ] Not less than $_____ per month; [X] On a schedule established by the defendant's Community Corrections Officer. [ ]: _____ The defendant shall remain under the Court's jurisdiction and the supervision of the Department of Corrections for up to ten years from date of sentence or release from confinement to assure payment of financial obligations.

4.2 **CONFINEMENT OVER ONE YEAR:** Defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commencing: [X] Immediately;
[ ] (Date): _____ by _____.m.

LIFE WITHOUT THE POSSIBILITY OF PAROLE OR EARLY RELEASE on Count No. I.

60 MONTHS on Count No. II.

The terms in Count(s) No. I, II are concurrent/consecutive.

The sentence herein shall run concurrently/consecutively with the sentence in cause number(s) _____ but consecutive to any other cause on each count not referred to in this Judgment.

Credit is given for [X] 373 days served [on each count] [ ] days as determined by the King County Jail solely for conviction under this cause number pursuant to RCW 9.94A.120(13). [ ] The jail term is satisfied; defendant shall be released under this cause.

4.3 [X] **NO CONTACT:** For the maximum term of LIFE ~~years~~, defendant shall have no contact with Rodella Oblero and Jeannine Oblero

Violation of this no contact order is a criminal offense under chapter 10.99 RCW and will subject a violator to arrest; any assault or reckless endangerment that is a violation of this order is a felony.

4.4 **BLOOD TESTING:** (sex offense, violent offense, prostitution offense, drug offense associated with the use of hypodermic needles) **Appendix G** is a blood testing and counseling order that is part of and incorporated by reference into this Judgment and Sentence.

4.5 **COMMUNITY PLACEMENT:** Community Placement is ordered for sex offense, serious violent offense, second degree assault, deadly weapon finding, Chapter 69.50 or 69.51 RCW offense, and standard mandatory conditions are ordered. Community placement is ordered for the maximum period of time provided by law. [ ] **Appendix H** (for additional conditions) is attached and incorporated by reference in this Judgment and Sentence.

4.6 [ ] **WORK ETHIC CAMP:** The court finds that the defendant is eligible for work ethic camp and is likely to qualify under Sec. 4(3), Chap. 338, Laws of 1993 and the Court recommends that the defendant serve the sentence at a work ethic camp. If the defendant successfully completes the program, the Department of Corrections shall convert the period of work ethic camp confinement at the rate of one day of work ethic camp confinement to three days of total standard confinement. Upon completion of the work ethic camp program, the defendant shall be released on community custody for any remaining time of total confinement.

4.7 [ ] **SEX OFFENDER REGISTRATION** (sex offender crime conviction): **Appendix J** is attached and incorporated by reference into this Judgment and Sentence.

4.8 [ ] **OTHER:** _____

The defendant shall report to an assigned Community Corrections Officer upon release from confinement for monitoring of the remaining terms of this sentence.

Date: 2/18/97

Presented by:

/s/ Ronald H. Clark
RONALD H. CLARK, WSBA #1341
Deputy Prosecuting Attorney

/s/ Joan E. Dubuque
JOAN E. DUBUQUE, Judge

Approved as to form:

/s/ Peter T. Connick
Attorney for Defendant, WSBA #12560

PETER T. CONNICK

APPENDIX D

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. LAWRENCE KELLER, Petitioner.	NO. 68993-8 **ORDER** C/A NO. 40207-2-I (Filed Jun. 6, 2000)

Department I of the Court considered this matter at its June 6, 2000, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is granted as to the persistent offender issue.

DATED at Olympia, Washington this 6th day of June, 2000.

/s/ Richard P. Guy
CHIEF JUSTICE

APPENDIX E

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	NO. *CR 125982*
	)	PLEA AGREEMENT
vs.	)	
LAWRENCE JOHN KELLER	)	
	)	
Defendant	)	

The State of Arizona and the defendant hereby agree to the following disposition of this case:

Plea: The defendant agrees to plead guilty to:

Count I Aggravated Assault a class 3 dangerous felony in violation of ARS 13-1204, 13-1203, 13-701, 13-702, 13-801 and 13-604

Count II Theft a class 3 felony in violation of ARS 13-1801, 13-1802, 13-701, 13-702 and 13-801

Count I is a dangerous offense under the criminal code. Count II is nondangerous.

Terms: On the following understanding, terms and conditions:

[ ] /s/ LJK 1. The crime carries a presumptive sentence of *7/5* [sic] years; a minimum sentence of *5* years; and a maximum sentence of *15* years as to count II 5 years, 3.75 years and 10 years.

Probation is not available. Restitution of economic loss to the victim and waiver of

extradition for probation revocation procedures will be required.

The maximum fine that can be imposed is 300,000 plus 12 percent surcharge. Special conditions regarding sentence, parole, or commutation imposed by statute (if any) are *as to count I the defendant shall not be eligible for suspension or commutation of sentence, probation, pardon or parole or release on any other basis until 2/3 the sentence imposed by the court is served.*

[ ] /s/ LJK 2. The parties stipulate to the following additional terms: (These stipulations are subject to court approval at the time of sentence as set forth in paragraph 5). *The defendant's sentence in this case shall be concurrent with the sentence he is presently serving in the state of Washington however the sentence in this case need not be coterminous. The sentences for counts I and II must also run concurrently. [RE /s/] [JCM /s/][/s/ LJK]*

[ ] /s/ LJK 3. The following charges are dismissed, or if not yet filed, shall not be brought against the defendant: *Count III*

[ ] /s/ LJK 4. This agreement serves to amend the complaint or information to charge the offense to which the defendant pleads, without the filing of any additional pleading. However, if the plea is rejected by the court or withdrawn by either party, or if the conviction is reversed upon an appeal by the defendant, the original charges and any charges that are dismissed by reason of this plea agreement are automatically reinstated.

[ ] /s/ LJK 5. If the defendant is charged with a felony, he hereby waives and gives up his rights to a preliminary hearing or other probable cause determination on the charges to which he pleads. The defendant agrees that this agreement shall not be binding on the State should the defendant be charged with or commit a crime between the time of this agreement and the time for sentencing in this cause, nor shall this agreement be binding on the State until the State confirms all representations made by the Defendant and his attorney, to-wit:

_____

_____

_____

In the event the court rejects the plea, or either the State or the defendant withdraws the plea, the defendant hereby waives and gives up his right to a preliminary hearing or other probable cause determination on the original charges.

[ ] /s/ LJK 6. Unless this plea is rejected by the court or withdrawn by either party, the defendant hereby waives and gives up any and all motions, defenses, objections, or requests which he has made or raised, or could assert hereafter, to the court's entry of judgment against him and imposition of a sentence upon him consistent with this agreement. Defendant further waives and gives up the right to appeal based upon any of the above.

[ ] /s/ LJK 7. If after accepting this agreement the court concludes that any of its provisions regarding the sentence or the term and conditions of probation are inappropriate, it can reject the plea, giving the state and the

defendant each an opportunity to withdraw from the plea agreement. In case this plea agreement is withdrawn, all original charges will automatically be reinstated. The defendant in such case waives and gives up his right to a probable cause determination on the original charge(s).

[ ] /s/ LJK 8. The parties hereto fully and completely understand and agree that it is the court's duty to impose sentence upon the defendant and that any sentence either stipulated to or recommended herein in paragraph two is not binding upon the court, and that the court need not accept either the stipulation or recommendation but is bound only by the limits set forth in paragraph one and the applicable statutes.

[ ] /s/ LJK 9. This plea bargain agreement in no way affects a civil vehicle forfeiture proceeding pursuant to A.R.S. Sec. 36-1041 through Sec. 36-1048 or A.R.S. Sec. 32-1993, if applicable, or other types of forfeitures pursuant to A.R.S. Sec. 13-106.

[ ] /s/ LJK I have read and understand the provisions of pages one and two of this agreement. I have discussed the case and my constitutional rights with my lawyer. I understand that by pleading guilty I will be waiving and giving up my right to a determination of probable cause, to a trial by jury, to confront, cross-examine, compel the attendance of witnesses, to present evidence in my behalf, my right to remain silent, my privilege against self-incrimination and presumption of innocence. I agree to enter my plea as indicated above on the terms

and conditions set forth herein. I fully understand that if, as part of this plea bargain, I am granted probation by the court, the terms and conditions thereof are subject to modification at any time during the period of probation. I understand that if I violate any of the written conditions of my probation, my probation may be terminated and I can be sentenced to any term or terms stated above in paragraph one, without limitation.

I have personally and voluntarily placed my initials in each of the above boxes and signed the signature line below to indicate I read and approved all of the previous paragraphs in this agreement, both individually and as a total binding agreement.

Date 2-2-83 Defendant *[/s/ Lawrence John Keller]*
LAWRENCE JOHN KELLER

I have discussed this case with my client in detail and advised him of his constitutional rights and all possible defenses. I believe that the plea and disposition set forth herein are appropriate under the facts of this case. I concur in the entry of the plea as indicated above and on the terms and conditions set forth herein.

Date 2-2-83 Defense Counsel *[/s/ John Martin]*
John Martin

I have reviewed this matter and concur that the plea and disposition set forth herein are appropriate and are in the interests of justice.

Date 2-2-83 Prosecutor *Randy Ellerson*
Randy Ellerson

IN THE SUPERIOR COURT

OF

MARICOPA COUNTY, STATE OF ARIZONA

26-16	3-9-83
[Illegible]	Date

Hon. Robert A. Hertzberg
JUDGE OR COMMISSIONER

VIVIAN KRINGLE Clerk
/s/ J. Scott Deputy

CR 125982

STATE OF ARIZONA,

vs.

/s/ Lawrence John Keller

County Attorney
By: /s/ Don Malinski
for Mark [Illegible]
/s/ James Martin P.D.
Criminal ~~Judgments~~
~~Clerk's Office~~
Dept. of Corrections
MCSO
APO

SENTENCE – IMPRISONMENT – DEPARTMENT OF CORRECTIONS PRESUMPTIVE/ AGGRAVATED/MITIGATED
(No Prior Conviction Alleged)

The State is represented by the above-named counsel; defendant is present with above-named counsel. and John Henry Brown.

Court Reporter Jennifer Stadler is present.

The defendant is advised of the charge, the determination of guilt and is given an opportunity to speak.

Having found no legal cause to delay rendition of judgment and pronouncement of sentence, the Court enters the following judgment and sentence:

IT IS THE JUDGMENT of the Court that the defendant is guilty of the crime of Count I – Aggravated Assault a Class 3 felony, dangerous/~~nondangerous~~, nonrepetitive offense in violation of A.R.S. 13-1204, 1203, 701, 702, 801, 604 committed on 3-1-82 and Theft a Class 3 felony, ~~dangerous~~/nondangerous, nonrepetitive offense in violation of A.R.S. 13-1801, 1802, 701, 702, 801 commited on 3-1-82.

Upon consideration of all the facts, law, and circumstances relevant here, the Court finds that suspension of sentence and a term of probation are not appropriate and that a sentence of incarceration with the Arizona Department of Corrections is appropriate. The Court further finds that there are circumstances sufficiently substantial to call for a (an) PRESUMPTIVE/AGGRAVATED/MITIGATED term as set by statute. These circumstances are as stated by the Court on the record.

As punishment for this crime, Count I, Aggravated Assault

IT IS ORDERED that the defendant be sentenced to imprisonment and committed to the Arizona Department of Corrections for a period of 7½ years; which is the Presumptive/~~Aggravated/Mitigated~~ term to date from this date and defendant is to be given credit for 34 days served prior to sentencing.

As to Count II, Theft

IT IS ORDERED that the defendant be sentenced to imprisonment and committed to the Arizona Department of Corrections for a period of 5 years; which is the Presumptive/~~Aggravated/Mitigated~~ term to date from this date and to run concurrently/~~consecutively~~ with Sentence in Count I and defendant is to be given credit for 34 days served prior to sentencing. Sentences are to run concurrent with sentence Defendant now serving in Washington.

As to _____

IT IS ORDERED that the defendant be sentenced to imprisonment and committed to the Arizona Department of Corrections for a period of _____ years; which is the Presumptive/Aggravated/Mitigated term to date from _____ and to run concurrently/consecutively with _____ and defendant is to be given credit for _____ days served prior to sentencing.

As to _____

IT IS ORDERED that the defendant be sentenced to imprisonment and committed to the Arizona Department of Corrections for a period of _____ years; which is the Presumptive/Aggravated/Mitigated term to date from _____ and to run concurrently/consecutively with _____ and defendant is to be given credit for _____ days served prior to sentencing.

The defendant is advised concerning rights of appeal and written notice of those rights is provided.

IT IS FURTHER ORDERED exonerating any bond.

IT IS FURTHER ORDERED granting the motion to dismiss Count III

IT IS FURTHER ORDERED authorizing the Sheriff to deliver defendant to the custody of the Arizona Department of Corrections.

IT IS FURTHER ORDERED that the Clerk shall remit to the Department of Corrections a copy of this order, plus all pre-sentence reports, probation violation reports, medical and psychological reports relating to the defendant and involving this cause.

FILED: Notice of Rights of Appeal, signed by the defendant.

ISSUED: Order of Confinement.

/s/ Robert Hertzberg
JUDGE OF SUPERIOR COURT

APPENDIX F

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. LAWRENCE JOHN KELLER, Petitioner.	NO. 68993-8 **ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION TO STRIKE AND FILE REPLY** (Filed Aug. 16, 2001)

The Court having considered the Petitioner's Motion for Reconsideration and Motion to Strike Portion of State's Response and for Leave to File a Reply to State's Response to Motion for Reconsideration;

Now, therefore, it is hereby

ORDERED:

Petitioner's Motion for Reconsideration and the Motion to Strike Portion of State's Response and for Leave to File a Reply to State's Response to Motion for Reconsideration are both denied.

DATED at Olympia, Washington this 16th day of August 2001.

/s/ Gerry L. Alexander
CHIEF JUSTICE

APPENDIX G

Arizona Revised Statute

§ 13-1204. Aggravated assault; classification

A. A person commits aggravated assault if the person commits assault as defined in **§ 13-1203** under any of the following circumstances:

1. If the person causes serious physical injury to another.

2. If the person uses a deadly weapon or dangerous instrument.

3. If the person commits the assault after entering the private home of another with the intent to commit the assault.

4. If the person is eighteen years of age or more and commits the assault upon a child the age of fifteen years or under.

5. If the person commits the assault knowing or having reason to know that the victim is a peace officer, or a person summoned and directed by the officer while engaged in the execution of any official duties.

6. If the person commits the assault knowing or having reason to know the victim is a teacher or other person employed by any school and the teacher or other employee is upon the grounds of a school or grounds adjacent to the school or is in any part of a building or vehicle used for school purposes, or any teacher or school nurse visiting a private home in the course of the teacher's or nurse's professional duties, or any teacher

engaged in any authorized and organized classroom activity held on other than school grounds.

7. If the person meets both of the following conditions:

(a) Is imprisoned or otherwise subject to the custody of any of the following:

(i) The state department of corrections.

(ii) The department of juvenile corrections.

(iii) A law enforcement agency.

(iv) A county or city jail or an adult or juvenile detention facility of a city or county.

(v) Any other entity that is contracting with the state department of corrections, the department of juvenile corrections, a law enforcement agency, another state, any private correctional facility, a county, a city or the federal bureau of prisons or other federal agency that has responsibility for sentenced or unsentenced prisoners.

(b) Commits an assault knowing or having reason to know that the victim is acting in an official capacity as an employee of any of the entities prescribed by subdivision (a) of this paragraph.

8. If the person commits the assault while the victim is bound or otherwise physically restrained or while the victim's capacity to resist is substantially impaired.

9. If the person commits the assault knowing or having reason to know that the victim is a fire fighter, fire investigator, fire inspector, emergency medical technician or paramedic engaged in the execution of any official duties, or a person summoned and directed by such

individual while engaged in the execution of any official duties.

10. If the person commits the assault knowing or having reason to know that the victim is a licensed health care practitioner who is certified or licensed pursuant to title 32, chapter 13, 15, 17 or 25,[1] or a person summoned and directed by the licensed health care practitioner while engaged in the person's professional duties. The provisions of this paragraph do not apply if the person who commits the assault is seriously mentally ill, as defined in § 36-550 or is afflicted with Alzheimer's disease or related dementia.

11. If the person commits assault by any means of force which causes temporary but substantial disfigurement, temporary but substantial loss or impairment of any body organ or part, or a fracture of any body part.

12. If the person commits assault as prescribed by **§ 13-1203**, subsection A, paragraph 1 or 3 and the person is in violation of an order of protection issued against the person pursuant to § 13-3602 or 13-3624.

* * *

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[1] Sections 32-1401 et seq., 32-1601 et seq., 32-1800 et seq., 32-2501 et seq.

APPENDIX H

Revised Code of Washington

[Former] RCW 9.94A.030, Definitions

(21) "Most serious offense" means any of the following felonies or a felony attempt to commit any of the following felonies, as now existing or hereafter amended:

(a) Any felony defined under any law as a class A felony or criminal solicitation of or criminal conspiracy to commit a class A felony;

(b) Assault in the second degree;

(c) Assault of a child in the second degree;

(d) Child molestation in the second degree;

(e) Controlled substance homicide;

(f) Extortion in the first degree;

(g) Incest when committed against a child under age fourteen;

(h) Indecent liberties;

(i) Kidnapping in the second degree;

(j) Leading organized crime;

(k) Manslaughter in the first degree;

(l) Manslaughter in the second degree;

(m) Promoting prostitution in the first degree;

(n) Rape in the third degree;

(o) Robbery in the second degree;

(p) Sexual exploitation;

(q) Vehicular assault;

(r) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;

(s) Any other class B felony offense with a finding of sexual motivation, as "sexual motivation" is defined under this section;

(t) Any other felony with a deadly weapon verdict under RCW 9.94A.125;

(u) Any felony offense in effect at any time prior to December 2, 1993, that is comparable to a most serious offense under this subsection, or any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a most serious offense under this subsection;

(v)(i) A prior conviction for indecent liberties under RCW 9A.88.100(1)(a), (b), and (c), chapter 260, Laws of 1975 1st ex. sess. as it existed until July 1, 1979, RCW 9A.44.100(1)(a), (b), and (c) as it existed from July 1, 1979, until June 11, 1986, and RCW 9A.44.100(1)(a), (b), and (d) as it existed from June 11, 1986, until July 1, 1988;

(ii) A prior conviction for indecent liberties under RCW 9A.44.100(1)(c) as it existed from June 11, 1986, until July 1, 1988, if: (A) The crime was committed against a child under the age of fourteen; or (B) the relationship between the victim and perpetrator is included in the definition of indecent liberties under RCW

9A.44.100(1)(c) as it existed from July 1, 1988, through July 27, 1997, or RCW 9A.44.100(1)(d) or (e) as it existed from July 25, 1993, through July 27, 1997.

* * *

---

(25) "Persistent offender" is an offender who:

(a)(i) Has been convicted in this state of any felony considered a most serious offense; and

(ii) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.360; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted; or

(b)(i) Has been convicted of: (A) Rape in the first degree, rape of a child in the first degree, child molestation in the first degree, rape in the second degree, rape of a child in the second degree, or indecent liberties by forcible compulsion; (B) murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, or burglary in the first degree, with a finding of sexual motivation; or (C) an

attempt to commit any crime listed in this subsection (25)(b)(i); and

(ii) Has, before the commission of the offense under (b)(i) of this subsection, been convicted as an offender on at least one occasion, whether in this state or elsewhere, of an offense listed in (b)(i) of this subsection. A conviction for rape of a child in the first degree constitutes a conviction under subsection (25)(b)(i) only when the offender was sixteen years of age or older when the offender committed the offense. A conviction for rape of a child in the second degree constitutes a conviction under subsection (25)(b)(i) only when the offender was eighteen years of age or older when the offender committed the offense.

9.94A.120. Sentences

When a person is convicted of a felony, the court shall impose punishment as provided in this section.

(1) Except as authorized in subsections (2), (4), (5), (6), and (8) of this section, the court shall impose a sentence within the sentence range for the offense.

(2) The court may impose a sentence outside the standard sentence range for that offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

(3) Whenever a sentence outside the standard range is imposed, the court shall set forth the reasons for its

decision in written findings of fact and conclusions of law. A sentence outside the standard range shall be a determinate sentence.

(4) A persistent offender shall be sentenced to a term of total confinement for life without the possibility of parole or, when authorized by RCW 10.95.030 for the crime of aggravated murder in the first degree, sentenced to death, notwithstanding the maximum sentence under any other law. An offender convicted of the crime of murder in the first degree shall be sentenced to a term of total confinement not less than twenty years. An offender convicted of the crime of assault in the first degree or assault of a child in the first degree where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years. An offender convicted of the crime of rape in the first degree shall be sentenced to a term of total confinement not less than five years. The foregoing minimum terms of total confinement are mandatory and shall not be varied or modified as provided in subsection (2) of this section. In addition, all offenders subject to the provisions of this subsection shall not be eligible for community custody, earned early release time, furlough, home detention, partial confinement, work crew, work release, or any other form of early release as defined under RCW 9.94A.150 (1), (2), (3), (5), (7), or (8), or any other form of authorized leave of absence from the correctional facility while not in the direct custody of a corrections officer or officers during such minimum terms of total confinement except in the case of an offender in need of emergency medical treatment or for the purpose of commitment to an inpatient

treatment facility in the case of an offender convicted of the crime of rape in the first degree.

* * *

9.94A.125. Deadly weapon special verdict – Definition

In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

Enacted by Laws 1983, ch. 163, § 3, eff. July 1, 1984.

9A.20.021. Maximum sentences for crimes committed July 1, 1984, and after

(1) Felony. No person convicted of a classified felony shall be punished by confinement or fine exceeding the following:

(a) For a class A felony, by confinement in a state correctional institution for a term of life imprisonment, or by a fine in an amount fixed by the court of fifty thousand dollars, or by both such confinement and fine;

(b) For a class B felony, by confinement in a state correctional institution for a term of ten years, or by a fine in an amount fixed by the court of twenty thousand dollars, or by both such confinement and fine;

(c) For a class C felony, by confinement in a state correctional institution for five years, or by a fine in an amount fixed by the court of ten thousand dollars, or by both such confinement and fine.

(2) Gross misdemeanor. Every person convicted of a gross misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than one year, or by a fine in an amount fixed by the court of not more than five thousand dollars, or by both such imprisonment and fine.

(3) Misdemeanor. Every person convicted of a misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than ninety days, or by a fine in an amount fixed by the court of not more than one thousand dollars, or by both such imprisonment and fine.

(4) This section applies to only those crimes committed on or after July 1, 1984.

[1982 c 192 § 10.]

9A.36.031. Assault in the third degree

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

(a) With intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself or another person, assaults another; or

(b) Assaults a person employed as a transit operator or driver, the immediate supervisor of a transit operator or driver, a mechanic, or a security officer, by a public or private transit company or a contracted transit service provider, while that person is performing his or her official duties at the time of the assault; or

(c) Assaults a school bus driver, the immediate supervisor of a driver, a mechanic, or a security officer, employed by a school district transportation service or a private company under contract for transportation services with a school district, while the person is performing his or her official duties at the time of the assault; or

(d) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm; or

(e) Assaults a fire fighter or other employee of a fire department, county fire marshal's office, county fire prevention bureau, or fire protection district who was performing his or her official duties at the time of the assault; or

(f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering; or

(g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault; or

(h) Assaults a nurse, physician, or health care provider who was performing his or her nursing or health care duties at the time of the assault. For purposes of this subsection: "Nurse" means a person licensed under chapter 18.79 RCW; "physician" means a person licensed under chapter 18.57 or 18.71 RCW; and "health care provider" means a person certified under chapter 18.71 or 18.73 RCW who performs emergency medical services or a person regulated under Title 18 RCW and employed by, or contracted with, a hospital licensed under chapter 70.41 RCW.

(2) Assault in the third degree is a class C felony.

[Former] 46.61.522. Vehicular assault – Penalty

(1) A person is guilty of vehicular assault if he operates or drives any vehicle:

(a) In a reckless manner, and this conduct is the proximate cause of serious bodily injury to another; or

(b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and this conduct is the proximate cause of serious bodily injury to another.

(2) "Serious bodily injury" means bodily injury which involves a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body.

(3) Vehicular assault is a class C felony punishable under chapter 9A.20 RCW.

APPENDIX I

Excerpt from:

NO. 40207-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

LAWRENCE KELLER,

Appellant.

* * *

BRIEF OF APPELLANT

* * *

A. ASSIGNMENTS OF ERROR

* * *

6. The life sentence in this case constitutes cruel punishment in violation of the Eighth Amendment to the United States Constitution and article 1, § 14 of the Washington Constitution.

* * *

10. The Persistent Offender Accountability Act violates the Due Process Clause of the 5th and 14th Amendments to the United States Constitution.

11. The trial court erred by imposing a life sentence without the possibility of parole for appellant's offense.

* * *

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

* * *

6. Is a life sentence without the possibility of parole for a class C felony cruel punishment in violation of the 8th Amendment to the United States Constitution and article 1, § 14 of the Washington Constitution?

* * *

10. Does the Persistent Offender Accountability Act violate the Due Process Clause of the United States Constitution?

11. Does due process require that appellant's prior "strikes" be proved beyond a reasonable doubt?

APPENDIX J

Excerpt from:

NO. 40207-2-1

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent.

V.

LAWRENCE KELLER,

Appellant.

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* * *

PRO SE BRIEF OF APPELLANT

A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

* * *

2. The trial court erred in counting Keller's prior Arizona conviction for "aggravated assault 3" as a prior "most serious offense" on the ground that Keller was armed with a deadly weapon and that there was a finding under RCW 9.94A.125 made by Arizona judge.

* * *

4. Trial judge erred in ruling during post sentence hearing as to weapon verdict in Arizona conviction.

* * *

APPENDIX K

Excerpt from:

S. Ct. No. _____
CoA No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respndent [sic]

v.

LAWRENCE KELLER

Appellant/Pet.

SUPPLEMENTAL PRO SE
PETITION FOR REVIEW

LAWRENCE KELLER
230364
Washington State Pen.
1313 N. 13th Ave.
Walla Walla, Wa. 99362

* * *

2. THIS COURT SHOULD ACCEPT REVIEW BECAUSE DETERMINATION THAT ARIZONA CONVICTION CONTAINED DEADLY WEAPON FINDING VIOLATES CONSTITUTIONAL DUE PROCESS.

The Court of Appeals ruling that there was a deadly weapon finding made by the Arizona court thereby constituting, and comparing to, a "most serious" offense

under the Persistent Offender definition RCW 9.94A.030 (23) (t), violates the Due Process Clause of the 5th and 14th Amendments to the United States Constitution. See Court of Appeals decision at 25 attached as Appendix "A" in counsel's Petition for review.

The 5th and 14th Amendments to the United States Constitution provide that no person shall be deprived of liberty without due process of law. The right to liberty is an important, fundamental right. *United States v. Salerno,* 481 U.S. 739, 750, 95 L.Ed.2d 697, 107 S.Ct. 2095 (1987)

The element or allegation that Keller was armed with a deadly weapon during the Arizona crime was never proven, stipulated to, substantiated, or knowingly pled to by Keller in the amended charged plea (See Pro Se brief Appendix 1 (b)(4)) agreement which he entered into and signed.

There was no finding by the Arizona court of a deadly weapon in accord with Washington statute RCW 9.94A.125 or any other statute. There must have, and need be, in the Arizona plea, a citing or allegation of that specific penalty enhancement (RCW 9.94A.125), and a "*knowing, voluntary* plea agreement to it by Keller – or it cannot now be invoked in the sentence of Mr. Keller:

> "Defendant was not informed of the enhanced penalty flowing from that statute, and that statute cannot now be invoked in the sentence of the defendant. The defendant relies on the principle enunciated in *State v. Frazier* 81 Wn.2d 628, 503 P.2d 1073 (1972) Court Agrees.

State v. Stamm, 16 Wn. App. 603, 559 P.2d (1976).

> Due Process requires that the defendant must have been advised of all the elements of the offense; he must have been given notice of what he was being asked to admit. *Henderson v. Morgan*, 426 U.S. 637, 646-7, 49 L.Ed.2d 108, 114-5, 96 S.Ct. 2253 (1976).

The original Grand Jury indictment, which the Court of Appeals relied on to make their ruling, had been amended and voided by the amended information and charge to which Keller eventually pled guilty:

> "This agreement serves to amend the complaint or information, to charge the offense to which the defendant pleads, without the filing of any additional pleading . . . " Plea Agreement, Appendix I (b) Pro Se Brief at # 4.

In this new amended complaint and charge, there is no allegation of a deadly weapon. Keller specifically read and initialed number 4.

> "The appellate courts of this state have held that when the State seeks to rely upon either RCW 9.95.040, or both, *Due Process of Law* requires that the information contain specific allegations to that effect, thus putting the accused person upon notice that enhanced consequences will flow with conviction . . . Preferably, compliance should take the form of *pleading by statutory language* and *citation of the statute* or statutes upon *which they are proceeding i.e. Firearms and/or deadly weapons." State v. Cosner*, 85 Wn.2d 45, 530 P.2d 317 (1975) at 50-51. (emphasis added.)

The ruling by the Washington State Court of Appeals that Keller's Arizona conviction for a class "C" felony was a "most serious" offense becasue [sic] of a deadly

weapon finding violates due process of law. Keller never knowningly [sic] or voluntarily pled guilty to a deadly weapon finding in the Arizona plea. Keller shoud [sic] be resentenced to a standard range sentence.

* * *

Additionally, Keller wishes to supplement counsel Subin's Petition for Review by adding the following to his arguments:

3. *Cruel Punishment* – under the Eighth Amendment to the United States Constitution. *Harmelin v. Michigan*, 501 U.S. 957, 115 L.Ed.2d 836, 866 111 S.Ct. 2680 (1991) (Kennedy, O'Connor, and Souter J.J., concurring).

* * *

/s/ Lawrence Keller
#230364